

CWJ submission on Domestic Abuse Bill January 2021

The need for an offence of non-fatal strangulation

About Centre for Women's Justice

1. Centre for Women's Justice (CWJ) is a lawyer-led charity focused on challenging failings and discrimination against women in the criminal justice system. We conduct strategic litigation and provide training to frontline women's services across England and Wales on legal remedies available to victims.

2. Summary

CWJ is calling for a free-standing offence of non-fatal strangulation or suffocation. We believe that this form of offending is currently significantly under-charged across the UK. Our view is strongly supported by the Domestic Abuse Commissioner, the Victim's Commissioner and numerous domestic abuse charities from around England and Wales.¹

3. We support the amendments proposed by Baroness Helen Newlove:

"Offence of non-fatal strangulation or suffocation

A person (A) commits an offence if that person unlawfully strangles or suffocates another person (B).

A strangles or suffocates B if A impedes B's breathing, blood circulation, or both, by doing any of the following (manually or using any aid): (i) blocking B's nose, mouth, or both; or (ii) applying pressure on, or to, B's throat, neck, chest or more than one of these.

A person guilty of an offence under this section is liable –

(a) on summary conviction-

(i) to imprisonment for a term not exceeding 12 months (or 6 months, if the offence was committed before the coming into force of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020), or

(ii) to a fine, or both;

¹ Including Aurora New Dawn (Hampshire), Nia (East London), My Sisters Place (Middlesbrough), Calan (South Wales), Leeds Domestic Abuse Service, East Surrey Domestic Abuse Services, Juno Women's Aid (Nottingham), Liverpool Domestic Abuse Service, Advocacy After Fatal Domestic Abuse, Next Chapter (Essex), IDAS York, Refuge (national), Beyond the Streets, Local Solutions (Liverpool), Brighton RISE, Welsh Women's Aid

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or both.”

The second amendment is identical but limits the offence to situations where the parties are “personally connected” as defined in the Bill – so to intimate or family relationships only. If the first amendment fails, the second will be next best to it. The first is preferable as it would protect more women, such as those attacked by acquaintances or strangers.

Impact of non-fatal strangulation on victims

4. It is widely recognised that non-fatal strangulation and suffocation (e.g. with a pillow) are a common feature of domestic abuse and a well-known risk indicator. The standard risk assessment tool used by police and domestic abuse services is the “DASH” checklist which includes a question about attempts to strangle, choke, suffocate, or drown the victim. The questions in the DASH checklist were identified through extensive research on factors associated with serious domestic violence and homicide.² Research has found that a history of strangulation presents a seven-fold risk of death.³ Strangulation and asphyxiation are the second most common method of killing in adult female homicides, after stabbing. 29% were killed by this method in 2018⁴, 43 women, as compared to only 3% of male homicides (which include male children and male perpetrators).⁵
5. Importantly, research highlights how non-fatal strangulation is frequently used as a tool to exert power and control, and to instil fear, rather than being a failed homicide attempt.⁶ It sends the message that ‘if you do not comply this is how easily I can kill you’. Researchers have observed that many abusers do not strangle to kill, but to show that they *can* kill,⁷ using strangulation as a tool of coercion, often accompanied by death threats.⁸ The result is compliance and passivity by the victim in the relationship in the longer term.⁹ Non-fatal strangulation is a gendered crime.
6. Reports on prevalence of strangulation within intimate partner violence describe a “hidden epidemic”¹⁰. A range of studies indicates that whilst lifetime incidence of strangulation is between 3% and 9.7% in the adult population, this rises to 50-68% for victims of recurrent abuse. Two studies of intimate partner violence and sexual

² <https://safelives.org.uk/sites/default/files/resources/Dash%20risk%20checklist%20quick%20start%20guidance%20FINAL.pdf>

³ Glass et al., (2008) ‘Non-fatal strangulation is an important risk factor for homicide of women’ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2573025/>

⁴ The Femicide Census for 2018 includes females aged 14+ <https://www.femicidecensus.org/wp-content/uploads/2020/02/Femicide-Census-Report-on-2018-Femicides-.pdf> Office for National Statistics report a lower percentage because girls aged under 14 are included in the total, see note 5.

⁵ Office for National Statistics Homicides in England and Wales year ending March 2019 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/homicideinenglandandwales/yearendinmarch2019>

⁶ Thomas, Joshi and Sorenson (2014) ‘Do you know what it feels like to drown? Strangulation as coercive control in intimate relationships’ https://repository.upenn.edu/cgi/viewcontent.cgi?article=1190&context=spp_papers

⁷ Hawley et al., (2001) “A Review of 300 Attempted Strangulation Cases, Part 3: Injuries in Fatal Cases” [https://www.jem-journal.com/article/S0736-4679\(01\)00401-2/fulltext](https://www.jem-journal.com/article/S0736-4679(01)00401-2/fulltext) summarised at page 93 Strack and Gwynn (2011)

“On the Edge of Homicide: Strangulation as a Prelude” <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=861>

⁸ Bichard et al., (2020) ‘The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review’ <https://psyarxiv.com/c6zby/>

⁹ See note 6

¹⁰ Ibid

assaults where medical examinations took place found that strangulation was involved in 20% and 23% of cases respectively.¹¹

7. Reports describe strangulation as extremely painful and the inability to breathe as a “primal fear”.¹² Loss of consciousness can occur in 10 to 15 seconds and lack of oxygen to the brain results in mild brain damage. Studies report that between 8.9% and 38% of those strangled lose consciousness.¹³ Although there is little or no visible injury, numerous longer-term effects of strangulation are reported, including fractured trachea/larynx, internal bleeding, dizziness, nausea, tinnitus, ear bleeding, sore throat, a raspy voice, neurological injuries such as facial and eyelid droop, loss of memory and even stroke several months later as a result of blood clots.¹⁴ A further frightening array of symptoms is set out in a survey of 21 studies of neurological outcomes¹⁵ as well as increased risk of miscarriage.¹⁶
8. Beyond the physical and neurological impact, not surprisingly strangulation has been found to result in long-term mental health impacts. Post-traumatic stress disorder is closely linked to experiencing fear of imminent death. Four studies report “a sense of existential threat, a firm conviction that they were going to die”.¹⁷ Recent research included interviews with 204 women attending an NHS Sexual Assault Referral Centre in Manchester¹⁸ who reported that they had been strangled. In response to open questions about how they felt, a high proportion stated that they had thought they were going to die. Of these 204 women, 86 had been assaulted by a partner or ex-partner (42%). A survey of 13 studies of delayed psychological outcomes identifies depression, anxiety, suicidality, nightmares, PTSD, dissociation and exacerbation of existing mental health difficulties.¹⁹

Why is a new offence needed?

9. Under-charging demonstrates a failure by both police and prosecutors to appreciate the severity of non-fatal strangulation. A separate offence would also emphasise the importance of non-fatal strangulation when risk assessments are carried out.

The current legal position

10. There is currently no distinct offence of non-fatal strangulation or suffocation. Section 21 Offences Against the Person Act 1861 contains an offence of attempting to choke, suffocate or strangle in order to commit an indictable offence, however this only applies when the act is done in order to commit some other serious offence. The 2015 Law Commission report on the OAP Act²⁰ concluded that this offence was needlessly specific and should be abolished. It is usually difficult to prove intent for

¹¹ Ibid

¹² See note 8

¹³ 17% Wilbur et al (2001), 8.9% Zilkens et al (2016) and 38% Shields et al (2010) all cited in Bichard et al (2020) see note 8

¹⁴ Sorensen, Joshi and Sivitz (2014) A Systematic Review of the Epidemiology of Nonfatal Strangulation, a Human Rights and Health Concern <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4202982/> and Pendleton and Strack (2014) ‘7 facts every judge and attorney should know when domestic violence involves strangulation’

<https://blog.ceb.com/2014/09/19/7-facts-every-judge-and-attorney-should-know-when-domestic-violence-involves-strangulation/>

¹⁵ See note 8

¹⁶ Ibid

¹⁷ See note 8

¹⁸ Research by Dr Catherine White, Clinical Director, St Mary’s Sexual Assault Referral Centre, St Mary’s Hospital

¹⁹ See note 8

²⁰ http://www.lawcom.gov.uk/app/uploads/2015/11/51950-LC-HC555_Web.pdf

an offence of attempted murder (as noted above, often the intention is to frighten and coerce rather than to kill).

11. Prosecutions for strangulation or suffocation therefore have to be brought as an assault offence. However, the lack of observable injuries means that offenders' conduct is often minimised, and they are charged with common assault rather than with actual bodily harm (ABH). Common assault is a summary offence which can only be tried in the Magistrates Court, whereas ABH is a more serious 'either way' offence which can be tried in the Magistrates or the Crown Court. All summary offences must be charged within six months.
12. CPS guidance for prosecutors on offences against the person²¹ states that when deciding whether to charge with common assault or ABH:

*Whilst the level of charge will usually be indicated by the injuries sustained, ABH may be appropriate.....:[where] the circumstances in which the assault took place are more serious e.g. repeated threats or assaults on the same complainant or significant violence (e.g. by **strangulation or repeated or prolonged ducking in a bath**, particularly where it results in momentary unconsciousness.) (emphasis added)*

The guidance indicates that non-fatal strangulation and suffocation offences can result in a charge of ABH rather than common assault. However, in our experience this does not take place in a great many, and probably in the majority, of cases. There does not appear to be any published data and therefore we rely on anecdotal evidence from domestic abuse workers across the country.

Realities on the ground

13. CWJ carries out training for local domestic abuse services around England and Wales. Over the past two years we have trained over 32 organisations at 24 training days in London, the Midlands, North East and North West of England, North and South Wales and the South East. Our experience is based on reports by frontline domestic abuse support workers who take part in our training.
14. CWJ's training includes the CPS guidance quoted above. In most, if not all, training sessions, domestic abuse support workers report that where cases involving strangulation are charged, this is generally as common assault. We hear this consistently and from support workers across the country. We therefore believe this to be a systemic issue rather than local isolated failings.
15. CWJ has interviewed a Deputy District Judge in the Magistrates Court, who also sits as a Recorder in the Crown Court, and reports that under-charging of strangulation incidents appears to be extremely common. She states that a significant number of domestic abuse cases before the Magistrates' Courts include some element of non-fatal strangulation which are charged as the summary offence of common assault, instead of the more appropriate offence of ABH.
16. There are numerous side-effects flowing from such under-charging. Not only does the offence charged fail to reflect the gravity of the offending behaviour, but the sentencing options and potential for a custodial sentence are limited due to the initial charging decision.

²¹ <https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard>

17. In addition, a summary conviction is inevitably given less weight than a conviction for ABH in future risk assessments and public protection decisions. This includes future bail applications, sentencing decisions including dangerousness determinations, and Parole Board decisions. The underlying facts of offences are not always available when such decisions are made, and a summary offence has a relatively low place in the hierarchy of criminal offending and is less likely to be fully explored. This ripple effect throughout the criminal justice system has a long-term impact on public protection, with a disproportionate impact on women. It can also affect the evidence before the family courts and decisions on contact arrangements, which are intended to prioritise the welfare and safety of children.²²

Charging decisions

18. Frontline support workers report that police officers tend to focus primarily on physical injuries when assessing domestic abuse situations. Strangulation and suffocation leave minimal injury and are therefore easily dismissed as relatively minor and treated as common assault. CWJ frequently hears of cases where suspects are not charged because of the six-month deadline for charging a summary offence. Other categories of offences do not have a time limit. When strangulation is treated as common assault, rather than ABH, cases are closed by the police because the deadline has passed, without referral to CPS. A new non-fatal strangulation offence must be an 'either way' offence, both to reflect the severity of the conduct involved and remove time restrictions.

19. Prosecutors also bear responsibility for under-charging. The account from Sandra at box 2 below demonstrates unwillingness by prosecutors to bring an ABH prosecution in a case of repeat strangulation, in apparent breach of CPS policy, by both the initial prosecutor and those who conducted the Victim's Right to Review. Her case also illustrates how, although she reported to the police within four months, delays by the CPS meant that common assault charges were not brought due to the six-month deadline being missed, and the perpetrator escaped justice altogether.

Risk assessment

20. A separate offence of non-fatal strangulation will also help the police to identify this critical risk factor in their overall response to domestic abuse. Currently risk assessments follow the "DASH" system which involves 27 questions. One of these asks the victim if the assailant has ever tried to strangle/suffocate/choke/drown her. A positive response results in one tick on a form in which 14 ticks are required for an assessment of high risk. Although there is room for professional judgment, domestic abuse workers report that many risk assessments by police officers are formulaic. Creating a more serious offence should make this very significant risk factor stand out in the assessment process and result in better protection. This is illustrated by the Coroner's report in 2019 following the inquest into the death of Anne-Marie Nield,²³ see box 3 below.

²² The judge interviewed by CWJ has confirmed the contents of paragraphs 16 and 17

²³ See Coroner's Prevention of Future Deaths report <https://www.judiciary.uk/wp-content/uploads/2020/02/Anne-Marie-Nield-2019-0477.pdf>

The international picture

21. Under-charging of strangulation has been identified as a problem in the US, Australia and New Zealand.²⁴ This is due to the inherent difficulties arising from the combination of serious violence with lack of visible injuries. In the US, 37 states have introduced non-fatal strangulation offences²⁵ and in Australia the states of Queensland, New South Wales and South Australia have introduced offences, with the state of Victoria due to follow.²⁶ A new offence came into force in New Zealand in December 2018.²⁷ A summary of the impact of this new offence by the Chief Victims' Adviser to the New Zealand Government outlines how it has improved police attitudes, triggered up-skilling of medical professionals and increased public awareness and victim confidence.²⁸
22. The introduction of a specific offence in New Zealand followed a report by its Law Commission which conducted a detailed examination of the arguments for and against a free-standing offence and the sufficiency of the existing measures.²⁹ The New Zealand Law Commission considered that as a starting point, it was preferable for offences to be generic (for example homicide, or assault) *“to avoid a slide into a chaotic plethora of specific offences”*. However, it concluded that strangulation met the criteria for exceptions to this approach. In view of inadequacies in current charging practice, a new offence would be a more effective criminal sanction than the existing options, and would increase awareness of the significant dangers of strangulation and generally improve the safety of victims of domestic abuse.³⁰

Public opinion

23. Widespread support for the amendment can be gauged by an online petition calling for the new offence, which has attracted over 100,000 signatures³¹, which is entirely unconnected to CWJ. There has been a great deal of interest in a new offence in the media.³² One researcher points out that waterboarding has been condemned as inhumane and prohibited even when pursued for the legitimate purpose of preventing terrorist attacks. Strangulation is even more severe, as not only is breathing impeded but also blood flow to the brain. Yet, whilst waterboarding is banned, the “intimate terrorism” faced by huge numbers of women is not addressed.³³ There is little moral ambiguity about addressing strangulation inflicted deliberately with the intention of causing pain and fear.
24. A major concern about the evidence surrounding non-fatal strangulation is the lack of knowledge within the general population about the risks involved. The longer-term physical effects described above would come as a surprise to many. Strangulation is a recurring feature in pornography and has become increasingly normalised in sexual

²⁴ Para 1.4 New Zealand Law Commission report ‘Strangulation, the case for a new offence’ <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R138.pdf>

²⁵ Gwinn, Strack and Mack (2014) ‘Law Reform Targets the Crimes of Strangulation’ cited in NZ Law Commission report, see note 24

²⁶ <https://strangulationprevention.com.au/wp-content/uploads/2019/08/AISP-NON-LETHAL-STRANGULATION-LEGISLATION-AUSTRALIA-2.pdf>

²⁷ New Zealand Law Commission <https://www.lawcom.govt.nz/news/new-strangulation-offence>

²⁸ Letter from Kim McGregor, NZ Chief Victim’s Adviser to CWJ 9.12.20

²⁹ See note 24

³⁰ Ibid, paragraphs 1.16 to 1.18

³¹ <https://www.change.org/p/boris-johnson-mp-uk-home-office-make-non-fatal-strangulation-a-specific-criminal-offence>

³² BBC 5 Jan 2021 <https://www.bbc.co.uk/news/uk-55531093> and there was also press coverage on the same day in the Times, Telegraph, Daily Mail, Guardian and elsewhere

³³ See note 8

encounters following the increased access to pornography in the digital age.³⁴ Strangulation features in popular mainstream literature such as *Fifty Shades of Grey*.³⁵ In a recent BBC survey of over 2,000 participants 38% of women under 40 had experienced strangulation during sex, with 42% of those saying it was unwanted, and they had felt pressured, coerced or forced.³⁶ The existence of a specific strangulation offence would have an educational element, highlighting the dangers involved in this behaviour. Any debate on whether consent should be a defence to strangulation should be conducted with the medical evidence about the dangers well in mind, as well as the context of strangulation occurring within patterns of controlling behaviour in domestic abuse.

The wording of the amendment

25. The words “strangle” and “suffocate” should be given their ordinary meaning. The amendments would also apply to deliberately holding a person underwater (the CPS guidance refers to dunking in a bath) and “positional asphyxia” by bodyweight.³⁷ The wording is based on the New Zealand offence, with the addition of pressure to the chest to cover the latter method of suffocation.
26. The amendment proposed does not specify whether the act must be carried out without the consent of the victim for the offence to be made out. The word “unlawfully” enables a defendant to introduce whatever concept applies in law in relation to consent. The general common law position is that consent provides a defence to an assault, however this is subject to the decision of the House of Lords in *R v Brown (1993)*³⁸ where a majority decided that consent cannot provide a defence to ABH or more serious injuries. The question of whether consent is available as a defence is dealt with in the so-called ‘rough sex defence’ clause of the Bill. The proposed wording of the strangulation amendments therefore allows for the availability of a defence of consent to be determined elsewhere, whether in caselaw or statute.
27. Both amendments will address the situation reported by domestic abuse services. The first version of the amendment does not confine the new offence to a domestic abuse context. The New Zealand Law Commission debated the issue and concluded that the new offence should not be limited to “family violence”.³⁹ The Commission noted that the difficulties around under-charging arise from the nature of strangulation rather than the context. Ideally, a broader offence would protect victims in all situations, the majority of them women. The so-called ‘rough sex defence’ clause in the Bill also similarly extends across the board beyond the domestic abuse context in order to provide the necessary protections.

³⁴ Edwards (2016) ‘Assault, strangulation and murder, challenging the sexual libido consent defence narrative’ cited in Bichard et al., see note 8

³⁵ See note 8

³⁶ BBC (2019) Savanta ComRes survey. Table with full results retrieved from https://www.comresglobal.com/wp-content/uploads/2019/11/Final-BBC-5-Live-Tables_211119cdh.pdf cited in Bichard et al., see note 8

³⁷ “positional asphyxia” is well established as posing a risk to life in police training on methods of physical restraint and has been found to be a cause of death in a number of deaths in police custody. See for example Independent Review into Deaths and Serious Incidents in Police Custody (2017) page 35

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655401/Report_of_An_giolini_Review_ISBN_Accessible.pdf

³⁸ *R v Brown* [1993] 2 All ER 75 House of Lords

³⁹ Paragraphs 5.25 to 5.28, see note 24

Conclusion

28. A freestanding offence of strangulation or asphyxiation, which is an 'either way' offence, will require police to treat such cases with the gravity they deserve and refer all such cases to the CPS for a charging decision. It will send a signal to the police and prosecutors about the seriousness of this form of offending, with training around the links between strangulation / asphyxiation, domestic abuse and homicide.

Case studies⁴⁰

Box 1: Ellie

Ellie's ex-partner Jason¹ was prosecuted for a violent incident in June 2018 during which he strangled her twice. Ellie has a long-term medical condition which makes her particularly vulnerable and physically weak. There was a history of several years of emotional and physical abuse in the relationship. This escalated, with a number of physical incidents in the months before June 2018, for which he was not prosecuted.

On the day of the assault in June 2018 Ellie was subjected to a verbal onslaught and left the room. A short while later, despite her attempts to diffuse the situation, Jason pulled her out of another room, kicked her twice in the stomach, then grabbed her by the neck, strangling her, twisted her into a headlock, during which she began to black out. They were at the top of the stairs and her legs gave way and she fell down the stairs.

Jason was charged with two counts of common assault and prosecuted in the Magistrates Court. Ellie provided police with her medical records, which evidenced her pre-existing medical condition, relevant to his claim that he acted in self-defence. Jason is 11 inches taller than Ellie, which also undermined his defence. The medical evidence was not provided by the police to the CPS. Ellie's daughter did a video-recorded police interview which went missing, delaying the trial by six months. The police also failed to submit photographic evidence. The judge later commented that the hand-written statement prepared by the police for Ellie was completely illegible.

Jason was convicted and sentenced to 12 months' probation. He appealed to the Crown Court and a support worker from a local domestic abuse service got involved to assist Ellie. She provided the CPS with the medical evidence that the police had apparently misplaced, along with a video recording by a family member of an admission by Jason.

Ellie had to give evidence for more than eight hours over two days during the appeal hearing, which took place almost two years after the offence itself. She has not been able to move on with her life during this time. The outcome of the appeal is still awaited due to lockdown.

⁴⁰ Names have been changed in boxes 1 and 2. 'Ellie' is supported by London Black Women's Project, East London, who assisted with preparation of this case study. Thanks to Juno Women's Aid, Nottingham, for facilitating the case study for 'Sandra'. Thanks to Anne-Marie's sister and to Bhatt Murphy solicitors for the case study for Anne-Marie Nield.

Box 2: Sandra

Sandra was strangled by her partner on approximately six occasions between December 2016 and January 2018. On two occasions he confessed and apologised in text messages the next day. In October 2017 she took photographs of finger marks around her neck and fled to a hotel that night with her daughter, she has a copy of the booking. In January 2018 she also took photographs of marks on her neck and informed a support worker. In May 2018 she fled to a refuge and reported the assaults to police two days later.

The police officer dealing with the case told Sandra that strangulation is a common assault which has a six-month deadline, but that she hoped the CPS would charge the January incidents. That weekend Sandra's ex-partner texted her to say that he would do everything he could to change, and that he was suicidal. The next day she withdrew her support for the prosecution and was told by police that they could still proceed without her. A month later she changed her mind and told the police officer that she did want a prosecution. The officer chased the CPS in light of the impending six-month time limit. In September 2018 Sandra was told by the police that the CPS had decided to charge with coercive control and include all the physical assaults under that charge.

In 2019, after a full download of Sandra's mobile phone, the CPS informed her that they would not proceed with a coercive control charge because she had been allowed to have a bank account, a phone, and to go abroad during the relationship, and had exchanged texts with her ex-partner during her first month at the refuge. There was no mention of ABH. She pursued a Victim's Right of Review (VRR) challenging the decision on coercive control and also suggesting that an ABH charge could still be brought, quoting the CPS guidance on strangulation, and pointing out the evidence in support of this charge. However, the VRR was unsuccessful and he was never charged with any offence.

A Family Court judge later found that Sandra's ex-partner had committed assaults on her after a two-day fact-finding hearing. In early 2020 Sandra was contacted on social media by her ex-partner's new girlfriend who shared her concerns about abusive behaviour by him. She was also contacted by the police when this girlfriend applied for disclosure under Clare's Law.

Box 3: Anne-Marie Nield

Anne-Marie died during a sustained assault by her partner, who had previously subjected her to non-fatal strangulation. Officers who dealt with the previous incidents failed to appreciate the significance of strangulation as a risk factor, and graded the risk as standard rather than high. There was no support offered to her and no referral to the multi-agency panel. The Coroner expressed concern that at the time of the inquest two and a half years later there was still no reference to non-fatal strangulation in the police force's domestic abuse policy and a lack of understanding of the issue amongst the officers involved.