

23 February 2022

Department of Justice
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Tas 7001
Via email: haveyoursay@justice.tas.gov.au

Criminal Code Amendment Bill 2022

Introduction

1. Full Stop Australia warmly welcomes the opportunity to consult on the proposed Criminal Code Amendment Bill 2022 (the Bill).
2. Full Stop Australia is very supportive of the insertion of a specific provision relating to stealthing in the law relating to consent, and also the inclusion of a new, specific offence of strangulation. However, we note that we do have some concerns relating to the form of both provisions.
3. We will now deal with each proposed reform in turn.

About Full Stop Australia

4. Full Stop Australia is an accredited, nationally focused, not-for-profit organisation which has been working in the field of sexual, domestic and family violence since 1971. We offer expert and confidential telephone, online, and face to face counselling to people of all genders who have experienced sexual, domestic or family violence, and specialist help for their supporters and those experiencing vicarious trauma. We also provide best practice training and professional services to support frontline workers, government, the corporate and not for profit sector. Finally, Full Stop Australia advocates with governments, the media and the community to prevent and put a full stop to sexual, domestic and family violence.
5. Our counselling services include the Domestic Violence Impact Line, a counselling service and support for people experiencing domestic and family violence across Australia, the Sexual Assault Counselling Australia line for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse, the LGBTIQ+ violence counselling service and the NSW Sexual Violence Helpline (formally NSW Rape Crisis) for those impacted by sexual assault (including friends, families and supporters). In the 2020/21 financial year, Full Stop Australia provided 16,195 occasions of service to 3,984 clients nationally. 84% of callers identified as female and 90% identified as someone who had experienced sexual, domestic and/or family violence.

The stealthing provision

6. The Bill provides a new sub-section 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, during the sexual intercourse”.

7. While Full Stop Australia is strongly supportive of a stealthing provision being included in the Bill, we do have concerns with the operation of this sub-section:
 - a. The sub-section does not adequately capture stealthing that occurs using other devices that prevent sexually transmitted infections or act as contraception (for example, dental dams).
 - b. In order to engage the sub-section, the complainant must “say or do anything to communicate to the other person that a condom must be used”. In our view, this approach is problematic as it focuses the enquiry solely only on what the complainant said or did, rather than looking holistically at what both parties said or did to determine whether the complainant consented to a sexual act on the basis that a device be used.
8. By way of background, stealthing occurs when an individual removes or otherwise tampers with a condom or other device to prevent an STI or pregnancy during sexual intercourse without the other person’s knowledge or consent.¹ In a stealthing scenario, an individual has consented to ‘protected’ sex and typically only becomes aware of the device’s removal or tampering *after* the intercourse has ended.² A study conducted by Monash University in 2018 found that one in three women and one in five men said they had been stealthed.³ Given the high prevalence of stealthing, we warmly welcome the Government’s intention to clarify the law to ensure that stealthing is included. We just want to ensure that the Government’s proposed section adequately captures all stealthing scenarios under the law.
9. Despite the prevalence of stealthing, it remains largely unreported with only 1% of respondents in the Monash University Study having reported the incident to police.⁴

¹ Brianna Chesser, Nadia David and April Zahra, *Consent, Stealthing and Desire-Based Contracting in the Criminal Law*, (Routledge 2022) 72.

² Ibid.

³ Ibid.

⁴ Chesser, *Consent, Stealthing and Desire-Based Contracting in the Criminal Law*, 74.

As such, we would like to ensure that the stealthing provisions in the Bill do not set too high a bar for any potential prosecutions.

10. The Australian Capital Territory (ACT) passed the first legislative reform in the world which expressly criminalises stealthing. The *Crimes (Stealthing) Amendment Bill 2021* amends s 67 of the *Crimes Act* to explicitly state that consent is negated by an 'intentional misrepresentation' about the use of a condom during sex.⁵
11. In regards to our concern expressed at clause 7(b) above, we are concerned that the proposed sub-section focuses solely on what the complainant said or did to communicate to the other person that a condom must be used. So in our view, the proposed sub-section does not account for a circumstance where, for example, a complainant engages in sexual activity having relied on a representation made by the accused, rather than saying or doing anything herself to indicate she wishes a condom to be used. For example, an accused may say to the complainant "I'm going to use a condom" or something to that effect. In reliance on this representation, the complainant engages in sexual activity. Unbeknownst to the complainant, the accused tampers or otherwise removes the condom. In this type of scenario, the complainant may not have said or done anything to communicate to the accused that they wanted a condom to be used. Nevertheless, they consented to the sexual activity in reliance on that particular representation of the accused. We are not confident that the proposed sub-section would apply in this kind of circumstance. Yet in our view, this is an example of sexual activity occurring without consent and should be criminalised.

Given all the above, we suggest the proposed sub-section say something along the lines of (additions in bold and struckthrough)⁶ :

*"(2A) Without limiting the application of subsection (2) to any act of sexual intercourse, a person does not freely agree to an act of sexual intercourse with another person if the first person **consents to the act of sexual intercourse subject to the other person using a device to prevent sexually transmitted infections or a contraceptive device** ~~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 the device; or*
- (b) tampers with the device; or*
- (c) removes the device –*

before or during the sexual intercourse without the first person's knowledge".

⁵ *Crimes Act 1990* (ACT) s67

⁶ Based in part on RASARA's submission to the Victorian Law Reform Enquiry on Sexual Offences [Sub 34 Rape and Sexual Assault Research and Advocacy final.pdf \(lawreform.vic.gov.au\)](#) at [21]. www.fullstop.org.au

12. Stealthing presents significant adverse consequences for the complainant. Complainants are at risk of sexually transmitted infections, unintended pregnancy and often experience severe psychological trauma and shame associated with the violation of one's autonomy.⁷ The criminalisation of sexual offences operates to prosecute those who have knowingly penetrated or touched the complainant in a way which they have not agreed to, thereby violating their sexual autonomy.⁸ As such, stealthing can be considered to vitiate consent through modifying the act to which an individual has initially consented to, and through the altering of the consequences of the act through the increased risks of unprotected sex.⁹ Given this, we are strongly of the view that the provision should focus on all the circumstances surrounding what the complainant consented to, rather than focusing on the more limited circumstances outlined above.
13. Finally, Full Stop Australia acknowledges that criminalising an offence provides for societal condemnation, sending the message to accused persons that their behaviour is reprehensible.¹⁰
14. However, criminalisation cannot occur in a vacuum. As such, Full Stop Australia recommends a campaign to educate and raise awareness about consent and stealthing be rolled out alongside the new legislation to ensure the offence is comprehensive and effective in its practice.

Strangulation, choking and suffocation

15. Full Stop Australia welcomes the Bill's intention to create a new offence under strangulation and choking (s170B):

"A person who intentionally and unlawfully chokes, suffocates or strangles another person is guilty of a crime. Charge: strangulation"

16. We support that the Bill:
 - inserts a new s333A creating alternative convictions to attempted murder, being the new s170B strangulation offence and existing s170 (Acts intended to cause grievous bodily harm or prevent apprehension);
 - adds the new s170B strangulation offence as an alternative to sections 170 (Acts intended to cause grievous bodily harm or prevent apprehension) and 172 (Wounding or causing grievous bodily harm) by amending existing s334A; and
 - adds the new s170B strangulation offence as an alternative to section 170A (Persistent family violence) by amending existing s337A.

⁷ Chesser, *Consent, Stealthing and Desire-Based Contracting in the Criminal Law*, 73.

⁸ Criminal Law Review (2015), Department of Justice and Regulation (Vic), Victoria's New Sexual Offence Laws 6. [copy of cd 15 260259 discussion paper victoria s new sexual offence laws an introduction web site version 3 pdf.pdf \(justice.vic.gov.au\)](https://www.justice.vic.gov.au/copy-of-cd-15-260259-discussion-paper-victoria-s-new-sexual-offence-laws-an-introduction-web-site-version-3-pdf.pdf)

⁹ Chesser, *Consent, Stealthing and Desire-Based Contracting in the Criminal Law*, 76.

¹⁰ Chesser, *Consent, Stealthing and Desire-Based Contracting in the Criminal Law*, 96.

17. We support that the Bill inserts alternative convictions for a range of offences. We are however, cautiously optimistic regarding the alternative conviction of strangulation for attempted murder. We appreciate that the benefit of alternative convictions is that they give the jury an automatic alternative to the charge, if the evidence does not meet the threshold required. However, our concern is that providing the jury with this alternative for attempted murder, might reduce the likelihood of actually obtaining a conviction for attempted murder, in the rare cases where there is evidence of intention to murder. In the circumstances, we recommend that these amendments be monitored closely to ensure they are working as intended.

18. In relation to the strangulation offence itself, Full Stop Australia considers the NSW legislation to be the strongest approach when compared to other jurisdictions due to its scope. The offence is worded as follows:

(1A) A person is guilty of an offence if the person intentionally chokes, suffocates or strangles another person without the other person's consent.

Maximum penalty--imprisonment for 5 years.

(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.

The layout of the legislation encapsulates multiple forms and degrees of strangulation:

- strangulation without consent (5 years maximum penalty);
- strangulation with intent to render an individual unconscious and recklessness (10 years maximum penalty); and

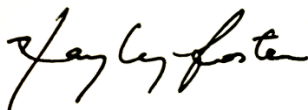
- strangulation with intent to render an individual unconscious with intent of enabling individual or assisting another person to commit another indictable offence (25 years maximum penalty).

19. While we appreciate that the alternative convictions regime included in the new bill provides options to police and prosecutors when charging in relation to non-fatal strangulation, we submit that it is still preferable to have a comprehensive stand-alone offence, like the one in NSW, that adequately captures different levels of strangulation and tailors the penalty accordingly.

20. Thank you again for the opportunity to make a submission. If you have any questions or would like to discuss further, please do not hesitate to contact me or Laura Henschke on laurah@fullstop.org.au

21. This submission has been prepared by Laura Henschke, Legal and Policy Officer, Taran Buckby, Legal and Policy Assistant and Leili Friedlander, Research Assistant.

Yours faithfully,



Hayley Foster
Chief Executive Officer
Full Stop Australia