

THE AUSTRALIAN LEGAL RESPONSE TO NON-FATAL STRANGULATION: POLICY RECOMMENDATIONS



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Executive Summary

Non-fatal strangulation (NFS) is a dangerous form of domestic violence. We need to understand and address the challenges of prosecuting offences of NFS to help ensure the safety of women and children. This policy brief draws on an examination of prosecution case files involving NFS. It identifies the key challenges and makes recommendations for responding to them.

Key challenges for prosecution:

- Aboriginal and Torres Strait Islander people are overrepresented in prosecutions of NFS offences.
- Children who witness or experience NFS are a highly vulnerable group and yet their support needs are not routinely considered.
- Almost half of those who make a complaint about NFS withdraw it, often leading to the charge being withdrawn.

Recommendations for response:

- Expand specialist Aboriginal and Torres Strait Islander courts to allow them to hear NFS cases and introduce a new provision into bail law.
- Further research towards developing specialist services for children to deal with the trauma of being strangled or watching strangulation.
- Provide targeted and individualised support to complainants to help them stay engaged with the prosecution process.

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Introduction

The offence of NFS was introduced in Queensland in 2016 (Queensland Criminal Code, 1899 (Qld), s315A). Many American states have introduced an NFS offence, with England introducing the offence in 2021 (Edwards & Douglas, 2021).

NFS offences recognise that strangulation is dangerous, may result in brain injury and pregnancy miscarriage (Edwards & Douglas, 2021). NFS is also a risk factor for future harm and death – an abused woman who is strangled by her partner is twice as likely to be killed in the weeks after the strangulation than an abused woman who has not been strangled (AIJA, 2021, [4.2]). Children often witness NFS and sometimes are also the victims of it.

Despite the seriousness of NFS, little attention has been given to how NFS laws have been working and how they might be improved (Fitzgerald et al., 2022). This policy brief addresses that gap.

Findings

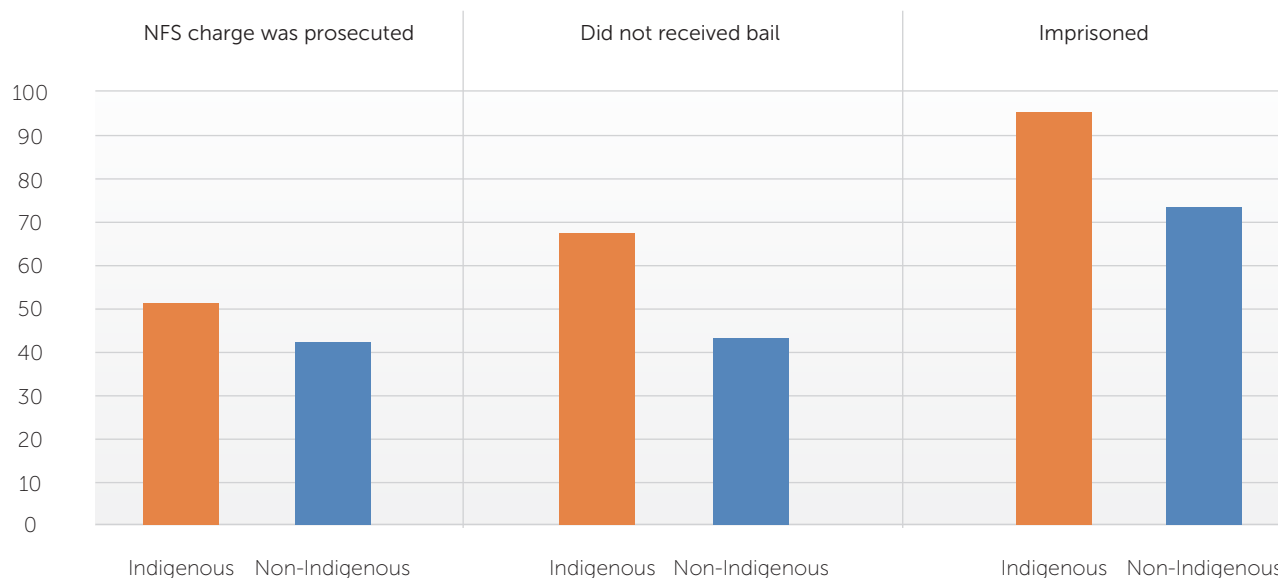
Our findings are based on analysis of a statewide sample of 210 finalised Queensland Office of the Director of Public Prosecution (ODPP) case files. Each file included one or more NFS charges and was finalised during the four-year period from 2017 to 2020 (Fitzgerald et al., 2022).

1. Unequal outcomes: The overrepresentation of Aboriginal and Torres Strait Islander People

The file examination highlighted the disproportionate application of NFS law to Aboriginal and Torres Strait Islander people. In Queensland, Aboriginal and Torres Strait Islander people account for four percent of the population but one in five defendants, and one in four complainants in the NFS case files. They were overrepresented as defendants at all stages of the legal process – from charge to bail and sentencing – and were more likely to be imprisoned when convicted.

Figure 1.

Percentage of Indigenous and non-Indigenous defendants charged with an NFS offence, prosecuted, bailed and sentenced to imprisonment, 2017-20, Qld



Fitzgerald, R., Douglas, H., Pearce, E. & Lloyd, M. 2022. [The Prosecution of Non-fatal Strangulation Cases: An Examination of Finalised Prosecution Cases in Queensland, 2017 – 2020](#), The University of Melbourne and The University of Queensland

The disproportionate imprisonment of Aboriginal and Torres Strait Islander people has been recognised as a 'national disgrace' (Australian Law Reform Commission [ALRC], 2018, p.22). The ALRC found that strategies to address it should include the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the drivers of crime and that systems should be put in place to ensure that courts are informed of the issues and the best available options, and that safe community-based options should be expanded for bail and sentencing (ALRC, 2018, p.13).

In relation to bail there is a need for standalone provisions that require bail authorities to consider issues that arise due

to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations so that bail conditions can be appropriately facilitated (ALRC, 2018, p.13).

In Queensland, specialist 'Murri courts' provide special bail programs for Aboriginal and Torres Strait Islander people and hear sentencing matters in the Magistrates Courts. These courts ensure that community and cultural information about appropriate bail and sentencing matters are heard by the court. However, Murri Courts do not operate in the District Courts (higher courts) where NFS offences must be sentenced in Queensland.

2. Children insufficiently supported as victims and witnesses of NFS

Children featured in the case files as both victims and witnesses of NFS.

Children as witnesses of NFS

Children were reported to have witnessed the NFS in nearly half of cases in which children lived in the home where NFS occurred. This is a likely undercounting given evidence from self-report victimisation surveys about the rate of childhood exposure to domestic violence which ranges from 60% and 80% (Fitzgerald et al., 2022).

More generally, research has pointed to intergenerational effects, where evidence demonstrates that men who witness domestic violence in childhood are more likely to commit such acts in adulthood (Roberts, et al., 2010), and both men and women exposed to domestic violence as children are more likely to also be victims of domestic violence in adulthood (ABS, 2017).

It is likely that NFS is particularly traumatic for children. We recommend further consideration of the kinds of support and programs that children may need in the aftermath of experiencing and/or witnessing NFS.

3. Insufficient support for complainants to keep them engaged in the system

Almost half of the complainants in the Queensland study withdrew their complaint before the court hearing of an NFS charge, often leading to the charge being withdrawn or dismissed.

Research reveals complex reasons why complainants withdraw from the prosecution. These include safety concerns, material concerns, about financial support, access to housing and impact on employment if they continue with the prosecution and relationship concerns including lost intimacy with the defendant and loss of the defendant as a father to the children (Douglas and Fitzgerald, 2021; VLRC, 2016).

Efforts to reduce complainant withdrawal should include recognising the effects of trauma on the victim, responding to her safety and material concerns and explaining the potential credibility problems the complainant may face in future if there are multiple versions of events on file (VLRC, 2016; Douglas & Fitzgerald, 2021).

Implications

The introduction of NFS offences in Australian states and other countries provides important recognition that strangulation is dangerous and carries significant risk of future harm and death in the context of domestic violence. However, despite the inherent value in such a law, our analysis of a statewide sample of 210 finalised Queensland ODPP case files shows that there is need for some change regarding the treatment of Aboriginal and Torres Strait Islander defendants and complainants, children who may be vulnerable to victimisation and witnessing of NFS, and complainants themselves, who, for a number of reasons may choose to withdraw from criminal prosecution of the offence.

Recommendations

We recommend:

1. Expansion of specialist Aboriginal and Torres Strait islander courts to allow sentencing of NFS cases involving Aboriginal and Torres Strait islander offenders and the introduction of a new provision into bail law to ensure cultural considerations are considered in bail hearings.

The expansion of specialist Aboriginal and Torres Strait islander courts to the higher courts has been successfully managed in Victoria. A review of the court found that it had benefits in promoting deterrence and rehabilitation and significantly improved the experience of Aboriginal and Torres Strait islander people's experience (County Koori Court, 2011).

The Murri Court process should be extended to the District Court in Queensland, to ensure that Aboriginal and Torres Strait Islander people have better access to culturally appropriate bail and sentencing options in response to NFS.

In Victoria bail decision-makers must take into account the person's cultural background, including the person's ties to extended family or place and any other relevant cultural issue or obligation (Bail Act 1977 (Vic), s3A).

Bail legislation should be amended in Queensland to explicitly require bail decision-makers take into account the person's cultural background, including the person's ties to extended family or place, and any other relevant cultural issue or obligation.

2. Further research towards developing specialist services for children to deal with the trauma of being strangled or watching strangulation.

There is very little research about children as direct victims or witnesses of NFS in the context of DFV. There is also little research about how best to support children and their families after an NFS event. We recommend more research to determine how best to identify these events (both in the health and criminal justice context) and how to support children after they have been strangled or witnessed NFS.

3. Provision of targeted and individualised support to complainants to help them stay engaged with the prosecution process.

The Queensland ODPP should consider implementing a process for a specialist victim support officers to assess the needs of the NFS complainant when they first engage with the prosecution process. The victim support officer would make a safety assessment and appropriate referrals to address the complainant's material and safety concerns. This process could be repeated at monthly intervals until the prosecution is complete.

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