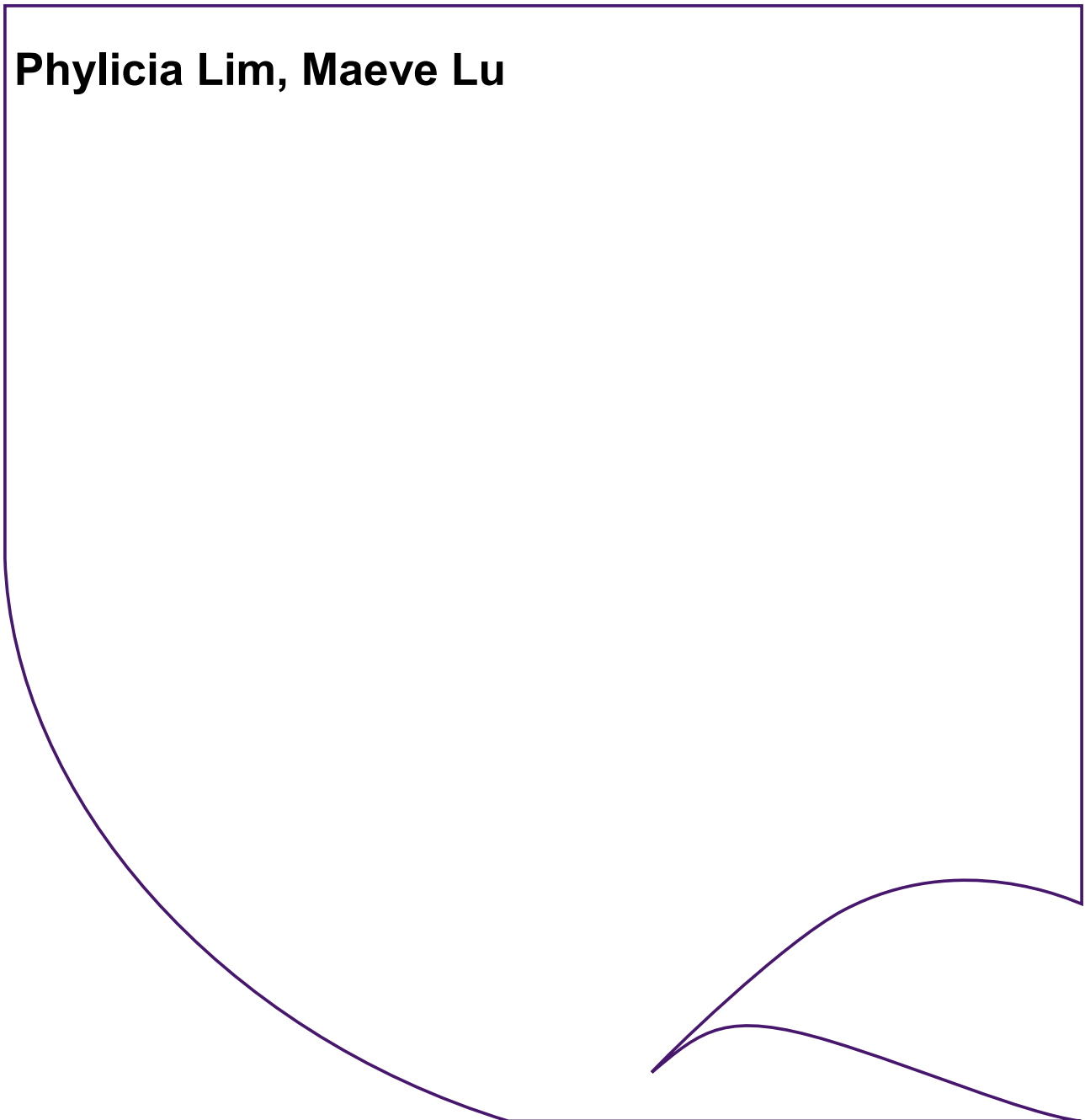


# Gender-related violence offences: Should a separate dousing offence be introduced?

**Phylcia Lim, Maeve Lu**



## About the Authors

This report was researched and authored by UQ law students **Phylicia Lim** and **Maeve Lu** under the academic supervision of **Dr Joseph Lelliott**. It was prepared for and on behalf of Women's Legal Service, a specialist community legal centre providing free legal and social work help to people who live and identify as women in Queensland. Student researchers undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession.

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## Overview

This report assesses whether a separate criminal offence should be introduced in Queensland to cover situations where victims have been doused in petrol and threatened with violence. It examines legislation across a range of jurisdictions to identify if a separate dousing offence currently exists in Australia or overseas, and discusses whether dousing offences are adequately captured by existing provisions in the *Criminal Code* (Qld).<sup>1</sup>

### 1. Separate Dousing Offences in Other Jurisdictions

Presently, there is no specific criminal offence in Queensland for dousing threats. Similarly, no other State or Territory in Australia has introduced a separate dousing threat offence.

An international jurisdictional scan was also conducted to identify whether a separate domestic violence offence for dousing exists. No specific dousing threat offence was identified; however, it should be noted that only legislation accessible in English was examined for this report. Only one common law country has a separate dousing-related criminal offence. Section 340B of the Indian Penal Code criminalises a husband burning his wife to death in demand of dowry.<sup>2</sup> However, this offence is evidently distinct from a dousing threat as it requires death to occur. More commonly, countries have criminalised acid throwing as a separate offence,<sup>3</sup> which is similar to dousing due to the act of throwing a substance on a victim. However, acid throwing offences are distinct from dousing: corrosive substances cause a particular type of instantaneous and serious visible bodily harm.

In contrast, dousing is unlikely to cause permanent physical harm, though it should be noted that contact with petrol can cause significant skin irritation and inhalation of fumes or ingestion may cause other, potentially serious, effects. Other harms caused by dousing are mental and emotional and linked to the victim's perception of the threat of violence.

### 2. Prosecuting Dousing Offences under the *Criminal Code* (Qld)

This section evaluates existing criminal offences in Queensland that may be used to prosecute dousing. It determines whether they adequately capture instances of such conduct.

#### 2.1 Threatening Violence, s 75

Threatening violence under s 75(1) makes it an offence to:

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<sup>1</sup> *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)').

<sup>2</sup> A dowry is a payment of property or money by the bride's family to the groom's family during marriage. Note that there is a culturally specific trend of domestic violence amongst South Asian countries, particularly in India, Bangladesh and Pakistan where men douse their partners in kerosene and light them on fire where they are unsatisfied with their dowry.

<sup>3</sup> See *Crimes Act 1961* (NZ) s 199; *Acid Offense Prevention Act 2002* (Bangladesh); *Pakistan Penal Code 1860* (Pakistan), s 336A, 336B; *Indian Penal Code 1860* (India) s 326A; *Law on Regulating Concentrated Acid 2012* (Cambodia).

1. Threaten to enter or damage a dwelling, with the intent to intimidate or annoy a person.
2. Do an act that is likely to cause any person in the vicinity to fear bodily harm or damage to property, with the intent to alarm any person.

Dousing threats may be prosecuted under s 75(1)(a) if the perpetrator threatens to set fire to property. Alternatively, dousing threats can arguably be prosecuted under s 75(1)(b) as dousing is likely to cause a person to fear bodily harm. Jacqui Barker successfully brought a private criminal proceeding in 2020 under s 75(1)(b) against her former partner. The defendant had doused her in petrol and held a lighter very close to her, after threatening to burn the house down. Dousing petrol was held to be an act likely to cause any person to fear bodily harm and the defendant admitted to an intent to alarm Barker.<sup>4</sup> Jacobs was sentenced to 120 hours of community service with no conviction recorded.<sup>5</sup>

In general, subjective intention is difficult to prove beyond reasonable doubt; as noted by Justice Kirby in *Peters v The Queen*, in the absence of a comprehensive and reliable confession, intention must ordinarily be inferred.<sup>6</sup> This evidentiary hurdle is even harder in domestic violence cases where the incident occurs behind closed doors and the only witnesses are the perpetrator and complainant, and where no lasting physical injury is sustained.<sup>7</sup> In relation to s 75, it may be difficult to prove a specific intention to intimidate, annoy or alarm the victim.

Perhaps the main criticism of the s 75 offence in the context of dousing is its penalty. The maximum penalty for threatening violence is two years imprisonment. While this increases to five years where the offence is committed 'in the night' (defined under s 1 as between 9pm and 6am), the time restriction appears arbitrary in the context of domestic violence. A penalty of up to two years imprisonment inadequately reflects the gravity of many circumstances of dousing, especially in cases where the victim believes they are about to be set on fire.

As an aside, it may be noted that defences available to assault-based offences in the *Criminal Code* (particularly provocation under ss 268 and 269) are not available to s 75.

## 2.2 Common Assault, s 335

The offence of assault can arise by application of force or by threat of force.

Assault by application of force includes the application of heat, light, gas or any substance if applied in such a degree would cause injury or personal discomfort.<sup>8</sup> Therefore, dousing petrol

<sup>4</sup> Alison Bevege, 'Petrol everywhere!' Woman re-lives her chilling Triple-0 call after her partner splashed her with fuel and threatened to set fire to their home with her inside - and reveals the four words that saved her life', *The Daily Mail* (online at 25 May 2020) <<https://www.msn.com/en-au/news/australia/petrol-everywhere-woman-re-lives-her-chilling-triple-0-call-after-her-partner-splashed-her-with-fuel-and-threatened-to-set-fire-to-their-home-with-her-inside-and-reveals-the-four-words-that-saved-her-life/ar-BB14xcRc>>.

<sup>5</sup> Sammi Taylor, 'Brave woman pursues private criminal trial of ex-partner for threatening violence after Queensland police refuse to prosecute', *60 Minutes* (online at June 2020). <<https://9now.nine.com.au/60-minutes/brave-woman-pursues-private-criminal-trial-of-expartner-for-threatening-violence-after-queensland-police-refuse-to-prosecute/17f90368-acfc-4994-b6fc-a3a3e92220a7#:~:text=On%20News-.Brave%20woman%20pursues%20private%20criminal%20trial%20of%20ex%2Dpartner%20for,Queensland%20police%20refuse%20to%20prosecute&text=Jacqui%20Barker%20is%20a%20phenomenally,law%20int o%20her%20own%20hands>>.

<sup>6</sup> *Peters v The Queen* (1998) 192 CLR 493, 551.

<sup>7</sup> Heather Douglas 'Do We Need a Specific Domestic Violence Offence?' (2015) 39 *Melbourne University Law Review* 434, 437; NSW Law Reform Commission and Australian Law Reform Commission, Parliament of Australia, *Family Violence - A National Legal Response* (Final Report, October 2010) ('*Family Violence Report*').

<sup>8</sup> *Criminal Code 1899* (Qld) s 245(2).

could be prosecuted under common assault by application of force, provided the prosecution can prove that the dousing of petrol caused the complainant personal discomfort.

For assault by threat to arise, there must be:

1. A bodily act or gesture
2. Ability to effect the purpose

Evidently, the act of dousing is a positive act and amounts to a bodily act or gesture.<sup>9</sup> Furthermore, dousing threats have the ability to effect the purpose of setting someone alight if they are holding a lighter.

While there is some uncertainty in Queensland as to whether assault by application of force requires proof of intention,<sup>10</sup> if one is needed it would generally be easy to prove. The prosecution would only need to prove that the accused intended to commit the act of dousing (i.e. that it was not an 'accidental' act). For an assault by threat of force, the bodily act or gesture must indicate an intention to assault.<sup>11</sup> In such a case, holding petrol near the victim, especially where combined with verbal threats, would likely evince intention.

As the threshold for common assault is low, s 335 is likely able to capture dousing threats. However, the main criticism regarding s 335 common assault in the context of dousing is penalty. Common assault attracts a maximum imprisonment of three years, which arguably does not adequately reflect the severity of the mental distress caused by dousing threats.

## 2.3 Torture, s 320A

The elements of torture under s 320A are:

1. The accused inflicted severe pain or suffering on another person;
2. The accused intended to inflict severe pain or suffering; and
3. The accused did so by an act or a series of acts done on one or more than one occasion.

The 'pain or suffering' inflicted includes mental or emotional pain, and can be either temporary or permanent.<sup>12</sup> Dousing threats may therefore be captured by s 320A. Although torture can be fulfilled through a single act, the offence appears to be more commonly applied to cases of ongoing abuse on multiple occasions<sup>13</sup> or a series of acts done on one occasion.<sup>14</sup> Additionally, meeting the standard of 'severe pain' will likely be more difficult where the pain inflicted is predominantly psychological or emotional pain.<sup>15</sup> Arguably, the standard of severe pain or suffering may be more easily met through multiple acts of violence (and indeed cases of torture in Queensland tend to reflect this) rather than a single act of dousing, and thus this provision may not capture all such acts. The provision is more likely to apply to situations when dousing threats are accompanied by other acts of domestic violence.

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<sup>9</sup> *Beal v Kelly* [1951] 2 All ER 763.

<sup>10</sup> See *Isitt v Commissioner of Police* [2016] QDC 308; *R v Chong* [2012] QCA 265; *Hayman v Cartwright* [2018] WASCA 116.

<sup>11</sup> Andreas Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 5th ed, 2018) 254.

<sup>12</sup> *Criminal Code 1899* (Qld) s 320A(2); *R v Burns* [2000] QCA 201.

<sup>13</sup> See *R v HAC* [2006] QCA 291; *R v Ottley* [2009] QCA 211; *R v R and S Ex parte Attorney-General* [2000] 2 Qd R 413.

<sup>14</sup> See *R v Peirson* [2006] QCA 251; *R v West* [2007] QCA 347.

<sup>15</sup> Andreas Schloenhardt et al, '20 years of torture: reflections on s320A of Queensland's criminal code' (2019) 43 *Criminal Law Journal* 58.

Furthermore, subjective intention may also be difficult to prove.<sup>16</sup> It is insufficient to prove that the pain or suffering was simply a consequence of the intentional acts of the accused. Rather, the prosecution must prove an actual, subjective intention to cause severe pain or suffering to the victim.<sup>17</sup>

The maximum penalty for torture is 14 years imprisonment. However, in 2018, Brett Turner pled guilty to torture and assault after dousing and threatening to set fire to his partner, and spent 440 days in custody prior to sentencing with no further time was ordered to be served.<sup>18</sup>

## 2.4 Assault Occasioning Bodily Harm, s 339

Assault occasioning bodily harm is a more serious offence than common assault. For this provision to arise, the elements of assault, as previously discussed, must be fulfilled.<sup>19</sup> Under s 339(1), there is an additional element that the assault must cause bodily harm.

Bodily harm is defined as 'any bodily injury which interferes with health or comfort'.<sup>20</sup> This has been interpreted by the courts as including psychiatric injury arising from an identifiable clinical condition, whilst excluding emotions such as fear or distress.<sup>21</sup> Sensations of pain alone without an identifiable bodily injury are also insufficient.<sup>22</sup> Thus, although the act of dousing alone may not cause identifiable physical bodily injury, it may fall within the scope of s 339 if it is found to have caused identifiable psychological harm. However, the prosecution's burden to establish a psychiatric injury arising from an identifiable clinical condition is likely to preclude many instances of dousing, which may cause significant emotional distress but no clinical condition, from successfully falling within s 339. Proof of causation between the act of dousing and a psychiatric condition may also pose problems.

S 339(1) attracts a maximum sentence of 7 years, and there are additional aggravating factors under s 339(3) which attract a maximum of 10 years. This provision may therefore provide sentences that more appropriately reflect the gravity of dousing threats than common assault; however, the requirement of a proven psychological harm means this provision is unlikely to capture the majority of dousing threats.

## 2.5 Threats, s 359

The threat offence under s 359 requires the physical element that the accused threatened to cause detriment as well as one of three alternative subjective mental elements:

1. Intent to prevent or hinder any person from doing any act which the other person is lawfully entitled to do;
2. Intent to compel any person to do any act which the other person is lawfully entitled to abstain from doing; or,
3. Intent to cause public alarm or anxiety.

Although dousing threats are likely to fulfil the physical element, the alternative mental elements may be difficult to establish. Many instances of dousing are not carried out with the specific

<sup>16</sup> Douglas (n 7); Family Violence Report (n 7).

<sup>17</sup> *R v Ping* [2006] 2 Qd R 69, [27]–[28]; *R v Burns* [2000] QCA 20.

<sup>18</sup> Sarah Barnham, "Terrifying": Coast dad tortures mum using fuel light', *Sunshine Coast Daily* (online at 17 April 2018) <<https://www.sunshinecoastdaily.com.au/news/terrifying-coast-dad-tortures-mum-using-fuel-light/3388831/>>.

<sup>19</sup> *R v Coulter* (1988) 164 CLR 350.

<sup>20</sup> *Criminal Code 1899* (Qld) s 1.

<sup>21</sup> See *R v Miller* [1954] 2 QB 282; *R v Chan-Fook* [1994] 2 All ER 552.

<sup>22</sup> *R v Scratchard* (1987) 27 A Crim R 136.

purpose of preventing or compelling the victim to do certain acts. The purpose of dousing is often to cause fear, punish the victim, or facilitate a general situation of control. Further, proving an accused acted with the intent to prevent or compel a person to carry out an act is a higher burden to prove than merely an intention to alarm an individual (as in the s 75 offence discussed above). An intent to cause public alarm or anxiety is unlikely to be applicable to dousing in a domestic violence context, where the majority of violence occurs in private. Subjective intention in general is difficult to prove beyond reasonable doubt,<sup>23</sup> and is particularly hard to establish in the context of domestic violence where victims' evidence may be uncorroborated.<sup>24</sup>

The maximum penalty for making a threat under s 359 is five years' imprisonment. Although this is a higher penalty than that of common assault, overall this provision appears to be inadequate for capturing many instances of dousing conduct due to the required mental elements.

## 2.6 Police Decision to Prosecute

In Queensland, the decision made to prosecute an offender is based on the following test:

1. Is there sufficient evidence?
2. Does the public interest require a prosecution?<sup>25</sup>

Based on this test, the police will only prosecute where there is a reasonable prospect of the defendant being found guilty of the offence.<sup>26</sup> Consequently, in light of the evidential difficulties mentioned above, instances of dousing are perhaps less likely to be prosecuted, particularly for more serious offences. Furthermore, a decision to prosecute may, of course, also be frustrated by the actions of police when first responding to and investigating cases. Failures to properly gather evidence, interview victims, or approach investigations cognisant of relevant context surrounding an offence, may all negatively impact later decision making. Misconceptions, biases, and other structural factors relevant to domestic violence cases generally can also play a role in prosecutorial decisions.

A clear example of these various dynamics is Jacqui Barker's case, where police decided not to prosecute her ex-partner Jacobs notwithstanding significant evidence of threats to harm and assault (as noted above in part 2.1). Police stated that this was due to the lack of independent evidence and Jacob's denial of an intention to burn Barker,<sup>27</sup> though this is controverted by subsequent information concerning the offending, as well as Barker's later successful efforts to prosecute Jacobs. Ultimately, that Jacobs was found guilty of threatening violence in a private criminal proceeding suggests that even when relevant offences against the person are capable of being established, police may be unwilling to pursue prosecution of dousing threats.<sup>28</sup>

## 2.7 Summary of Difficulties

Existing provisions in the *Criminal Code* (Qld) appear to be inadequate for capturing dousing threats. Some of the provisions examined require proof of mental elements or types of harm that are unsuited to situations of dousing. Furthermore, several potentially applicable offences, such as

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<sup>23</sup> Family Violence Report (n 7).

<sup>24</sup> Douglas (n 7).

<sup>25</sup> Queensland Police Service, *Operational Procedures Manual Issue 72* (at 27 September 2019) 8; Department of Justice and Attorney-General, 'Director's Guidelines', 2-8.

<sup>26</sup> Queensland Police Service (n 25) 8.

<sup>27</sup> Taylor, (n 5).

<sup>28</sup> Eve Jeffery, 'The Road Less Travelled in the Queensland Courts', *Echo.net* (online at 10 June 2020) <<https://www.echo.net.au/2020/06/the-road-less-travelled-in-the-queensland-courts/>>.



threatening violence and common assault, attract low penalties which are not proportionate to the severity of distress suffered by victims of dousing. It may be inferred that the lack of plainly applicable offences may deter prosecutions, or otherwise reinforce existing issues around prosecution of domestic violence.

### 3. Comparison to Specific Domestic Violence Offences

This section will evaluate the rationale for introducing a specific domestic violence offence of strangulation to consider whether a separate dousing offence should be introduced in Queensland.

The *Criminal Code* (Qld) introduced s 315A in 2015 to criminalise the choking, suffocation or strangulation of another person in a domestic setting.<sup>29</sup> The provision attracts a maximum penalty of seven years' imprisonment. The provision was informed by a report published by the Special Taskforce on Domestic and Family Violence in Queensland (the taskforce) which identified strangulation as a common feature of domestic and family violence, and a significant predictive risk factor for escalating domestic violence and homicide.<sup>30</sup> In particular, one study found that strangulation increased the risk of future homicide by 800%.<sup>31</sup> In contrast, there are currently no statistics regarding the prevalence of dousing threats, and no empirical research has been conducted to establish the significant risks and effects of dousing threats on domestic violence victims.

Another reason for the introduction of a specific strangulation offence in Queensland was the increasing concerns around strangulation in domestic and family violence internationally, such as in New Zealand and Canada,<sup>32</sup> as well as recognition of the dangerousness of strangulation in a United Nations report.<sup>33</sup> While there is currently no dousing threat offence in any jurisdiction internationally, dousing threats in domestic violence appear to have become more prevalent in Queensland with the media coverage of Hannah Clarke and Jacqui Barker.<sup>34</sup>

A specific strangulation offence was also introduced in New Zealand in 2018, with the same maximum penalty as the Queensland provision.<sup>35</sup> The new offence was informed by a New Zealand Law Commission Report, which argued that strangulation 'may result in significant internal or psychological signs and symptoms that often go undocumented,'<sup>36</sup> particularly as many victims 'believed they would die'.<sup>37</sup> Thus strangulation is difficult to raise under other serious violent crimes which require proof of harm, and the severe psychological burden is inadequately addressed by more easily established offences such as common assault.<sup>38</sup> In the Queensland context, the

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<sup>29</sup> Ibid.

<sup>30</sup> Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland* (Report, 28 February 2015) 302 ('Taskforce').

<sup>31</sup> Heather Douglas and Robert Fitzgerald, 'Strangulation, Domestic Violence and the Legal Response' (2014) 36 *Sydney Law Review* 231.

<sup>32</sup> Department of Justice and Attorney-General (Qld), *Discussion Paper: Circumstance of Aggravation and Strangulation* (October 2015) 10 ('Discussion Paper') 10.

<sup>33</sup> UN Women, *Felony Strangulation and Other Provisions* (2012) <<http://www.endvawnow.org/en/articles/834-felony-strangulation-and-other-provisions.html>>.

<sup>34</sup> Candace Sutton, 'Women Swamp Helpline Fearing Rowan Baxter Copycat Murders', *News.com.au* (online at 26 February 2020) <<https://www.news.com.au/national/crime/women-swamp-helpline-fearing-copycat-rowan-baxter-murders/news-story/06a95e815fe32aeec7ea1c915d14798d>>.

<sup>35</sup> *Family Violence (Amendments) Act 2018* (NZ) s 24.

<sup>36</sup> Law Commission, *Strangulation: the Case for a New Offence* (Report No 138, March 2016) 7 [1.15].

<sup>37</sup> Ibid 10 [2.11].

<sup>38</sup> Ibid 7 [1.15].

Taskforce also recommended the introduction of a specific offence of strangulation with a severe penalty in order to account for the severity and violence of the act.<sup>39</sup>

A similar rationale can be applied to the creation of a dousing offence. Dousing threats place victims in a position of believing they will be set alight and killed, creating significant psychological distress. As previously discussed, there is a gap in the *Criminal Code* (Qld) which does not adequately address the severity of this psychological harm.

The New Zealand Law Commission also notes the role of a new strangulation offence in police understanding of the severity and risks of strangulation. Such an understanding is important so that police; 1) do not overlook the psychological harm caused; 2) adequately document signs of strangulation and help victims get medical assessments; and 3) charge perpetrators with offences proportionate to the harm.<sup>40</sup> The introduction of a new dousing offence would arguably promote the same goals in the context of dousing.

Overall, the rationale for introducing a separate strangulation offence has some applicability to dousing threats, due to the severe psychological harm caused by both acts as well as the difficulties with prosecuting such acts under broader provisions.

## 4. General Considerations for Offence Creation

Law reform bodies have expressed that in a code jurisdiction such as Queensland, the general approach to creating offences should be to 'establish overarching offences of general application'<sup>41</sup> to avoid a 'slide into a plethora of specific offences'<sup>42</sup>. However, the Australian and New South Wales Law Reform Commissions state that new offences are justified if the act 'cannot be adequately dealt with under the existing legislative framework.'<sup>43</sup> Similarly, the New Zealand Law Commission states that 'in a fast-changing world, new phenomena or understandings may emerge or be identified to warrant the law's intervention if they are not already adequately catered for'.<sup>44</sup> As previously identified, the *Criminal Code* (Qld) does not adequately address dousing threats, and thus it is arguably justified to introduce a new offence.

## 5. Conclusion

There is a gap in the *Criminal Code* (Qld) which does not adequately capture dousing offences. The more readily applicable offences, such as common assault, carry penalties that inadequately reflect the severity of psychological harm caused by dousing. The rationale for introducing a separate strangulation offence is relevant to dousing threats, with both acts causing severe psychological harm and inadequately addressed in broader provisions. However, it would be beneficial to conduct further empirical research to accurately identify: 1) the prevalence of dousing threats; 2) police responses to reports of dousing; and 3) the severity of dousing threats and its effects on domestic violence victims. Nonetheless, the introduction of a separate dousing offence has the potential to remedy these issues.

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<sup>39</sup> Taskforce (n 32) 21.

<sup>40</sup> Law Commission (n 36) 33.

<sup>41</sup> Discussion Paper (n 32) 9.

<sup>42</sup> Law Commission (n 36) 7 [1.17].

<sup>43</sup> Family Violence Report (n 7) 587 [13.86].

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*Criminal Code Act 1899* (Qld)  
*Family Violence (Amendments) Act 2018* (NZ)  
*Indian Penal Code 1860* (India)  
*Law on Regulating Concentrated Acid 2012* (Cambodia)  
*Pakistan Penal Code 1860* (Pakistan)

## Other

Queensland Police Service, *Operational Procedures Manual Issue 72* (at 27 September 2019)  
Department of Justice and Attorney-General, 'Director's Guidelines'



## Contact details

### UQ Pro Bono Centre

T +61 7 3365 8824

E [probono@uq.edu.au](mailto:probono@uq.edu.au)

W [uq.edu.au](http://uq.edu.au)

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