Response to:

Consent to serious harm for sexual gratification – not a defence

11th January 2021

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The Women's Policy Group Northern Ireland (WPG) is a platform for women working in policy and advocacy roles in different organisations to share their work and speak with a collective voice on key issues. It is made up of women from trade unions, grassroots women's organisations, women's networks, feminist campaigning organisations, NGOs, LGBT+ organisations, support service providers, human rights and equality organisations and individuals.

Over the years this important network has ensured there is good communication between politicians, policy makers and women's organisations on the ground. Several members of the WPG are also submitting responses on behalf of their own organisations to this consultation, including: Raise Your Voice, Here NI, Committee on the Administration of Justice, Transgender NI, Women's Support Network and others.

We welcome investigation into the issue of consent to serious harm for sexual gratification and hope to see our consultation response reflected in the final outcome, particularly given the fact that we have proposed a far-reaching solution to the issues presented.

For questions or queries regarding this consultation response, please contact Elaine Crory elaine.crory@wrda.net

Introductory remarks:

We believe that this consultation presents an opportunity to examine an alternative approach to that taken in England and Wales, one that will help victims and their families more than the formalisation in legislation of the existing R v Brown case law.

There is no way to prevent defendants claiming that death occurred by accident, which is the essence of the so-called "rough sex defence". The approach taken in England & Wales was attempting to address this, but since the defence amounts to a lack of mens rea for murder and therefore cannot be banned as such. In practice this usually means that the charge becomes one of manslaughter rather than murder, and this is why these cases tend to result in unsatisfactory outcomes, and leaves families feeling like justice has not been delivered.

One example of this issue is seen in the case of the death of Natalie Connolly where the defendant was found guilty of manslaughter and served a short sentence because the mens rea for murder could not be proven. In fact in cases where the defendant has faced charges of murder and been convicted, such as the death of British backpacker Grace Millane, there is always additional evidence against them, proving a degree of premeditation or extraordinary lengths taken to conceal what has happened. These kinds of cases are less common than the kinds of offences where there is no such damning evidence. These are the cases that this response has in mind and hopes to address.

To truly bring justice for these crimes we need a new offence that would capture these reckless and negligent forms of sexual manslaughter and allow for appropriate sentencing in accordance with the culpability of the defendant. We have argued for this and outlined a suggested shape for the kind of offence that we have in mind in our response to Q. 4. We also take the view that education is central to addressing this issue in a way that might prevent further cases and indeed cases of sexual violence more broadly.

Q1 Do you think the law in Northern Ireland is sufficient as it stands?

No.

The law at present lacks the provision to deal with fatal cases where the defendant claims that death resulted accidentally as a result of sexual activity. This is the essence of the so-called "rough sex defence", but it is vital to consider that the law cannot prevent a defendant from claiming that a death was accidental and not intended, in other words that the defendant lacked the mens rea necessary for a conviction of murder.

This leads to a situation where murder charges are exceptionally difficult to prove, or even to charge, without exceptional evidence of premeditation. Therefore the resulting charge is often a charge of manslaughter, which in itself does not capture the nature of what has happened, since manslaughter implies an entirely accidental death and not one that resulted from conscious actions. This also has knock on effects as manslaughter convictions have sentencing guidelines that are designed to reflect the lesser degree of culpability that this conviction represents. As a result this often leaves victims' families feeling that justice has not been properly delivered and that the death of their loved one has not been given the weight that it deserves.

This leaves the legal system in a bind that seems to be resolved only by the introduction of a new category of offence. Therefore we will argue that we need to go further in this than England & Wales has, and create a bespoke piece of legislation that will create a specific sexual offence that captures

injury or death resulting from negligent and/or reckless sexual activity. This offence would succeed in capturing those cases where there is no evidence of intention to kill but that the recklessness was such that a responsible person should know that it could well result in serious injury or death.

We propose also that this can be done in a way that does not categorise certain sexual behaviours as inherently dangerous, an approach that often leads in practice to the pathologisation of certain sexual behaviours seen as "deviant". In the past this has tended to lead to the criminalisation of LGBT people and the turning of a societal "blind eye" to alternative practices within heterosexual marriages, as exemplified in the gap between the judgements in R v Brown and that of R v Wilson. To avoid this kind of disparity and to keep people safe from harm regardless of their domestic arrangements or their sex life, we need a robust educational programme alongside the provisions of a new law.

Separately there needs to be a non-fatal strangulation law passed that focuses specifically on non-consensual choking or strangulation. This would need to be framed in a way that includes the use of strangulation within a context of domestic abuse and also its use within sexual encounters where there may be no pre-existing relationship or domestic relationship between the parties.

Q2(a) Do you think that consent to serious harm should be outlawed in legislation, similar to the amendment to the Domestic Abuse Bill in England & Wales?

No.

We understand the impetus behind the campaign and are sympathetic to deep concern around the apparent lack of justice delivered in these cases as well as to the unease with the way in which these cases are framed but we believe that this approach is insufficient and cannot result in the outcome that campaigners seek. This is because, as outlined above, a defence amounting to a lack of mens rea for murder against a charge of murder cannot be outlawed.

Cronin et al argue that formalising R v Brown in legislation is insufficient "this will not prevent defendants from claiming they do not satisfy the definition of the offence they have been charged with. To effect any reform, and not waste this golden opportunity, campaigners must therefore shift their focus from the defence of consent to the issue of the substantive offence. If campaigners continue to talk of preventing a defence, they will fail to address the real problem, the lack of an adequate offence with which to charge defendants in these circumstances."[1]

Therefore this approach will not achieve its intended purpose, and so we outline what we believe to be a better approach in response to Q4.

Q2(b) If yes, do you think the offences to which the amendment applies are appropriate?

n/a

[1] https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence

Q3 Do you consider that a programme of education is needed to:
*** raise awareness of the dangers of rough sex, and the meaning of consent; and**
*** raise awareness within the criminal justice system to recognise and deal appropriately with the issue when a victim makes a complaint?**

Yes.

Education is a crucal piece of the puzzle if cases like this are to be prevented, if victims and their families are to be treated appropriately at all stages by the criminal justice system, and if the cases are to be dealt with in an appropriate way when they come before the courts. Having said that, we are careful to stress that we do not want to stray into a situation where any education on this topic is heteronormative, cisnormative, assumes ablebodiedness or indeed is overly moralistic with regards to sexual practices.

This is an area that has been traditionally controversial as the justice system has been reluctant to be excessively paternalistic or to interfere with the right of individuals to make their own lifestyle choices – at least with regards to heterosexual relationships – as exemplified in the decision of R v Wilson.

Work needs to begin with sex and relationships education at its most basic level. At present sex and relationships education in Northern Ireland is woefully insufficient, tending to be strictly heteronormative and to focus on abstinence rather than encouraging open discussions of these topics. Young people have made their views on the present state of sex and relationships education clear in a survey by Belfast Youth Forum where only half of young people think their right to relationship and sex education is currently not being met. 34% of young people who completed the survey had never received a relationship and sex education lesson in school, and of those young people who did receive lessons, only 10% said the information they received was "very useful." Only 23 percent of young people felt adults trusted young people to make their own decisions. Also, the older a young person becomes the poorer they think this education becomes. Further, only 1 in 5 receive any information relevant to LGBT+ relationships. The four most common word associations were "basic", "unhelpful" "useless" and "biased". [2]

The result of this gap in education colliding with the digital age has been an increase in young people relying on pornography for their sex education and the reported rise of non-consensual violence in sexual encounters[3] seems obviously connected with this situation. If we want to make a meaningful difference to the current state of affairs we must face the reality that the situation will not improve without intervention.

We argue that the focus ought to be on healthy, safe and consensual sex education that relies on communication and has consent as its absolute baseline. Consent must be fully unpacked rather than alluded to without explanation, and any such approach must take into account the prevalence of sexual violence within and outside of sexual relationships, pointing to a general confusion about what consent actually means in practice. This SRE must be inclusive of LGBT relationships and seek not to take a moralistic tone about what may be unconventional sexual practices but which are nonetheless happening, have always happened and will continue to happen. This includes the need to encourage the use of safewords and other means of communicating alongside verbal consent that is freely given, reversible, informed, enthusiastic and specific throughout all sexual encounters.

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[2] https://www.belfastcity.gov.uk/documents/youth-forum/any-use-report#subjectsrse
[3] https://www.theguardian.com/society/2019/jul/25/fatal-hateful-rise-of-choking-during-sex

In response to the Gillen Review into the law and procedures in serious sexual offences in NI, and indeed over a period of decades, numerous womens' and LGBT+ organisations stressed the need for an urgent re-think as to how sex and relationships education is approached here, in our schools and beyond. It is difficult to combat myths, debunk stereotypes and encourage healthy relationships and a safe approach to sex without centring education and ensuring that this approach is taken from all parties to this education. Despite the recommendations of CEDAW, the commitments made in the Northern Ireland (Executive Formation etc) Act 2019 to introduce compulsory SRE in schools and the evident need for reform in this area, it is evident that there remains an urgent need for thorough reforms.

With regard to the criminal justice system, we reiterate the arguments that women's organisations including the WPG submitted to the Gillen Report and indeed the findings of the Gillen Report itself; there is an urgent need for educational material that will not only inform the public and juries on the current legal status of various acts but will actively seek to dispel the myths that tend to surround issues like rape and other serious sexual offences. The Gillen Report was clear that education on these issues must be addressed as part of "an extensive public awareness and school education campaign", specifically recommending "introducing educational material for the benefit of the jury which might include a short video outlining the fallacy of these myths and judicial directions to this effect for the benefit of educating jurors at the very commencement of the trial, together with, if necessary, expert evidence on the subject."[4]

This work is absolutely necessary and urgent – not just for cases of the kind covered by this consultation, but for serious sexual offences of all kinds. The Gillen Report focuses on this issue at length and in detail, and there is an important reason for this; the dispelling of rape myths and the widespread acceptance and understanding of a robust concept of consent could be the most important part of the educational puzzle as regards this issue, and the issue of sexual violence more broadly.

Q4. Do you consider something different is required for Northern Ireland?

Yes.

We argue that a new, bespoke law designed with this issue in mind would best deal with the concerns raised around the so-called "rough sex defence".

Since the legal system cannot prevent defendants claiming that death was the accidental outcome of consensual activity, sexual or otherwise, this new law would provide for these cases. In these cases this argument can be addressed with a new charge – that the sexual activity was reckless or negligent to such a degree that a reasonable person must know that serious injury or death would be the likely outcome, akin to how the offence of causing death by dangerous driving charge creates a specific category of culpable manslaughter for cases where death or serious injury should have been foreseen as a possible outcome of the driver's conduct.

[4] https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf p.30

In our view this moment presents us with an opportunity to set the standard internationally as to how crimes like this can be dealt with in a way that both seeks to prevent them from occurring in the first place and that can deliver meaningful justice for victims.

We propose that this law should be a new category of sexual offence, based partially on the work of Dr Alison Cronin, Dr Jamie Fletcher and Dr Samuel Walker at Bournemouth University, whose work has informed our argument here. In the article *Homicide and Violence in Sexual Activity, Moving from Defence to Offence* they provide a persuasive argument that the legislation that would formalise the findings of R v Brown (1994) cannot actually prevent people from claiming that death caused during sexual activity was accidental, whatever its cause, resulting in the outcome that most of these cases are prosecuted as manslaughter or the defendant pleads guilty to the lesser charge of manslaughter. This cannot be mitigated against by formalising R v Brown, as per the approach in England and Wales; "in order to avoid a major legal pitfall, campaigners need to articulate the problem and their aim more clearly, engage with the current law and adopt the legal terminology that will effectively make their point. It is suggested that this could amount to a momentous change in criminal law that would see justice for victims who die as the result of violent sexual attacks. In order to achieve this, campaigners must move on from their discussion of defendants using a defence, which is not in law technically correct, and towards reform of the offence that the defendant has committed."[5]

In addition there is precedent for the creation of a specific offence lying between murder and manslaughter in the form of the offence of "causing death by dangerous driving" which captures offences where the driver should have known that their conduct while driving was such that it could have resulted in serious injury or death, even if the intent was not to kill, effectively prosecuting them for the outcome of their recklessness and negligence that could have been avoided with due care and attention.

In our preparation for this consultation we have contacted Dr. Alison Cronin and she has further advised us as to the outline of what such a bespoke offence could look like. One key element is that this new offence ought to be classified as a sexual offence.

The importance of categorising this as a sexual offence is as follows:
1. It accords with the principle of "fair labelling" and would allow for the development of fair and proportionate sentencing guidelines for this category of homicide.

2. Categorisation as a sexual offence has the procedural advantage that evidence of the victim's past sexual history could be restricted by an extension of the Youth Justice and Criminal Evidence Act 1999 ss. 41 and 42 provisions. This would address widespread criticism that the current procedural approach in homicide cases contains no bar to the inclusion of the victim's past sexual history.

3. Framing the offence in terms of a sexual nature is preferable to the contextualisation as domestic abuse that has occurred in England and Wales. This approach would recognise that sexual relations also occur outside "domestic" relationships and that joint consensual engagement in a dangerous activity does not necessarily amount to "domestic abuse" – to suggest that it is would be a denial of the autonomy of both parties and R v Wilson has shown a reluctance within the legal system to intrude on the domestic relationship from a paternalistic standpoint.

[5] https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence

Accordingly, we are specifically advocating the enactment of a sexual homicide offence, as an addition to the provisions of the Sexual Offences (NI) Order, that encompasses the existing law on manslaughter in the forms of unlawful and dangerous act, gross negligence, and reckless manslaughter with the additional element of sexual activity.

Cronin adds that "The adoption of the existing common law definitions with the addition of the sexual context has a number of benefits:

1. The application of the existing law to the sexual context provides parity with homicides committed in non-sexual circumstances, the sexual element being a matter of fact and serving as an aggravating or mitigating factor as appropriate.

2. There is no need to develop new and uncertain legal principles that may spawn future case law or retrospective appeals.

3. The existing common law definitions are sufficiently broad as to encompass dangerous or grossly negligent sexual conduct of any nature.

4. As the general law of homicide develops, either in common law or statute, the sexual killing offence would develop in step without the need for additional enactment/reform."

We take the view that the vision of a new, bespoke offence laid out by Cronin and her colleagues could be the remedy to the way these cases play out in the courtroom in Northern Ireland and elsewhere. To clarify, this law would be suitable for other jurisdictions also, but it is especially relevant in Northern Ireland because of our persistent issues with inadequate sex and relationships education, the higher rates of homophobia here and because of the section 5 duty to report any crimes to police, meaning for instance that a person injured during consensual sex may fear seeking medical attention as medical personnel would have a duty to report anything that they believed to be a crime.

For definition and fair labelling, the offence could be called "sexual manslaughter" or some variant, eg. "unlawful and dangerous sex manslaughter", "sexual gross negligence manslaughter", "manslaughter in the course of dangerous sexual activity", "killing by dangerous sexual conduct".

In addition the full roll out and timely update of sex and relationships education in schools, alongside the public awareness campaigns and education for those working within the legal system that was recommended in the Gillen Report, this approach will help to both to ensure justice for victims as well as to help prevent these kinds of cases from occurring.