



Department of
Justice

An Roinn Dlí agus Cirt

Männystrie O tha Laa

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**Consent to Serious Harm for Sexual Gratification:
Not a defence**

**Responses via Citizen Space and those received
outside Citizen Space**

The Consultation ran from 09/11/ 20 to 11/01/21

CONSENT TO SERIOUS HARM: NOT A DEFENCE” SUMMARY OF CONSULTATION RESPONSES AND WAY FORWARD

Introduction

In July 2020 the UK Government amended the Domestic Abuse Bill to put into legislation the existing legal precedent that consent will not be accepted as a defence to serious harm caused for the purpose of sexual gratification.

I considered this to be an important issue for consideration in Northern Ireland and commissioned an urgent review of the position and a public consultation to help inform decisions on whether or not to follow the approach being taken in England and Wales.

The consultation ran from 29 October 2020 until 11 January 2021 and generated 174 responses. It asked for views on the current position, and whether new legislation was necessary. It also asked about the need for a programme of education to raise awareness of the dangers of rough sex, and the meaning of consent.

The consultation formed part of a wider review of the law and the criminal justice family’s response to non-fatal strangulation, on which a further consultation will follow shortly. Many of you highlighted and discussed non-fatal strangulation as a common feature of non-consensual rough sex. Those responses will be most useful as I develop my thinking in this area, in preparation for the consultation phase of the wider review.

I am grateful to those of you who took time to respond to the consultation and for your views. Responses were thoughtful, considered and often passionate. From reading them, it is clear that this issue is of significant concern and that changes are needed to stem and address the seemingly increasing incidence of non-consensual rough sex, and to make a better future for victims.

This document summarises the responses received and sets out my decisions on the way forward.

The full transcript of responses has been published alongside this summary and way forward.

NAOMI LONG
MINISTER FOR JUSTICE

Background

In July 2020 the UK Government amended the Westminster Domestic Abuse Bill to put into legislation the legal premise that it is not a defence that an injured party consented to the infliction of serious harm for the purpose of sexual gratification.

This position had been set out in the 1994 English case of *R-v-Brown*. In its judgment the Court held that a person could not consent to anything more than a trifling or transient injury, and so any claim of “rough sex gone wrong” would not be accepted as a defence to serious injury or worse. A number of subsequent judgments had cast doubt on the applicability of the *Brown* decision or sought to limit its reach, and there was growing concern that the defence was being increasingly used in the courts.

The amendment to the Bill will enshrine the principle in legislation, and its applicability across the board, for absolute clarity. It specifies the defence cannot be used in offences where actual bodily harm or grievous bodily injury is inflicted, making an exception in relation to sexually transmitted infections of which the injured party was aware.

The Justice Minister commissioned a review of the position in Northern Ireland. The review included research of the position in neighbouring and other common law jurisdictions, and culminated in the consultation which asked 4 questions, seeking views on the need for similar legislation to the Domestic Abuse Bill amendment; and whether a programme of education or any other approach is needed.

Summary of Responses

Question 1: Do you think the law in Northern Ireland is sufficient as it stands?

- 3 respondents answered “yes”.
- 169 respondents answered “no”.
- 2 respondents did not answer this question.

The overwhelming majority of respondents considered current law insufficient.

Those in favour of change pointed to increasing numbers of cases where consent was being claimed as a defence. It was considered that strengthening the law and having a consistent position with other United Kingdom jurisdictions would provide greater legal clarity, raise

awareness, and improve the protection available for victims. The creation of new clear law could deter coercive and manipulative abusers; encourage more victims to come forward; and result in more appropriate sentences.

There was also a view that a change in the law could help educate people on acceptable practices, including addressing violent and degrading practices frequently depicted as “normal” in increasingly graphic and easily accessed pornography.

Views were expressed that the existing principle in the England and Wales case of *R-v-Brown* is outdated, restricted in its application, and in many cases not applied. There were concerns that the principle has been diluted and confused by later judgments, leaving the position unclear and unreliable.

Others felt that victims in Northern Ireland are not disadvantaged by not having a legislative statement. However, placing in legislation the principle in *R-v-Brown* provides the opportunity to examine the position in Northern Ireland and remove any doubt.

There were concerns for victims who have to give evidence against a claim of consent, especially: in a domestic setting where this can be very difficult; for sex workers who fear prosecution for engaging in sex work; and, especially where the victim died, with no one able to rebut the offender’s claims. There was also concern expressed for families hearing distressing accounts that the victim wanted the behaviour that ultimately led to their death.

Those who considered the law adequate as it stands were of the view that the *R-v-Brown* ruling remains relevant and equips the judiciary to deal with cases on the basis of their individual circumstances.

There was concern, particularly from the Lesbian, Gay, Bisexual, Transgendered and Queer or Questioning (LGBTQ) community, that any new law would curtail free choice and stigmatise non-conventional consensual sex such as bondage, dominance and submission or sadomasochism (BDSM) or ‘Chemsex’ which is done on a consensual basis.

Department’s Response and Way Forward

The Department is grateful to those who responded to this consultation and recognises the case for wider understanding, greater clarity and a change in the law. Specific proposals are detailed in the following sections.

While responses leaned strongly towards a need to provide better protection for women, the Department does not consider this to be exclusively a gender specific issue and emphasises that proposed changes will benefit all victims, regardless of gender, marital status, age or sexual orientation.

It should also be noted that any change will be careful not to criminalise truly consensual acts, provided no serious injury results.

Question 2a: Do you think that consent to serious harm should be outlawed in legislation, similar to the amendment to the Domestic Abuse Bill in England and Wales?

- 155 respondents answered “yes”.
- 16 respondents answered “no”.
- 3 respondents did not answer this question.

The figures illustrate a strong desire to introduce legislation similar to the provision in England and Wales, for much the same reasons as those outlined in responses to Question 1, primarily: to reflect evolving public attitudes; ensure clarity; and increase protection for victims.

A number of respondents provided or referred to valuable research findings illustrating the extent of the problem and supporting the argument for change.

Respondents in support of new legislation highlighted the potential for improved consistency throughout the process, from the point of reporting the offence right through to the point of sentencing. They also considered that clear legislation sends a message to perpetrators that they will be held accountable for the harm they cause.

A view was presented that current law re-victimises victims and called for change so that a person’s sexual history, or previous consent could not be used against them in evidence.

On consent, the point was made that a definition was required, and it was suggested this should be its ordinary meaning, not limited by the victim’s age. An existing definition in the Sexual Offences Act 2003 only applies within that Act.

Caution was needed to ensure that the new legislation would apply beyond domestic abuse cases but would not create legal risk for those engaging in BDSM practices in a “Safe and Sane” consensual manner, or in a “Risk Aware Consensual Kink” manner. The point was made that people can and should be able to consent to rough sex, but not to serious harm – the boundary needs to be clear.

Those not in favour of this legislation considered the case law provided sufficient clarity and robustness, allowing the judiciary an appropriate element of discretion to consider the facts in every case and arrive at suitable judgements.

A number of respondents considered a more fundamental and novel approach is needed, and that Northern Ireland should lead the way in addressing the problem. They suggested the proposed new legislation does not go far enough, that it will not prevent the defence of consent continuing to be used, and that new sexual violence legislation is

required, creating a new offence or offences.

Department's Response and Way Forward

Given the strength of support for introducing legislation to outlaw the defence of consent, the Department considers new legislation similar to that found in the Domestic Abuse Bill should be introduced in Northern Ireland, limited to those cases where serious harm occurred.

A number of respondents asked why the law is different in England and Wales. The devolved administrations each have responsibility for their own legislation in devolved areas of the law, which is why the laws across the United Kingdom can differ. What is right for one part is not always right for the others. Giving a voice to those affected through consultation exercises is a democratic strength, and allows us to take account of local circumstance and nuances, and to reflect on the experience of others.

The Department recognises that the defence of consent is an issue which extends beyond the domestic arena: that is why the question was not addressed in the Northern Ireland Assembly during the passage of the Domestic Abuse and Civil Proceedings Bill.

The issue of the use of a person's previous sexual history in court proceedings is one which was recently considered by Sir John Gillen in his independent review of the treatment of sexual offences.

The Gillen Review Implementation Team is taking forward a number of research projects, including research on the extent of previous sexual history being admitted in evidence. Copies of the responses to this consultation have been shared with the Gillen team to further support their work.

The Department acknowledges a number of calls to consider creation of new sexual offence legislation and is grateful for respondents sharing their ideas on this. We propose giving this further consideration in the context of the wider review of non-fatal strangulation legislation and practice.

Question 2b: If yes to 2(a), do you think the offences to which the amendment applies are appropriate?

The majority of respondents were content with the offences identified in the Domestic Abuse Bill, providing that they left no loopholes for seriously hurting a partner. Some noted the important balance of not unintentionally criminalising unintended lower-level injury. One respondent was concerned that the provisions of the Domestic Abuse Bill do not explicitly extend to cases where death occurs; it was important to make this clear and not leave anything to be inferred.

One respondent noted that the list did not include rape, making the point that previous consent to sex cannot be assumed to imply future consent.

A large number wished to ensure that non-fatal strangulation would be included in the list of offences to which the defence would not apply, and that offences causing trauma injuries should also be covered.

Rather than focussing on the extent of the physical injury sustained, some respondents called for any rough sex acts, including, strangulation, beating, choking, suffocation, electrocution or drowning to be included, as well as instances where severe mental health problems resulted.

Department's Response and Way Forward

The Department is conscious of the need to balance protection of victims from serious injury while at the same time recognising individuals' freedom to enjoy private consensual acts without fear of criminalisation. Any new provision must be tempered to respect these potentially conflicting perspectives.

We consider the range of offences identified in the Domestic Abuse Bill provides an appropriate level of protection within the current legislative framework in Northern Ireland, and therefore propose to mirror the provision found at clause 65 of the Bill.

The exclusion of the offence of common assault does not mean that every assault occurring in a sexual context will be excused: if consent is not supported by evidence, a person may still be convicted of assault.

As regards rape, this is an offence comprising of a number of elements including that the activity was non-consensual. This means where an alleged offender contends that the activity was consensual, the issue of consent remains a valid matter for consideration within a trial.

We have considered the request for extension to cases where death occurred, however the offences of murder and manslaughter are complex, and their inclusion could result in unintended consequences.

In those cases we are content that, as in England and Wales the principle that a person cannot consent to their own death will continue to apply, and the Court's role should not be fettered by legislation.

The Department acknowledges respondents' repeated concerns around sexual violence generally and around non-fatal strangulation specifically. We will address the consent defence for such offences in the context of the Department's wider review and forthcoming consultation.

Question 3: 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?**

- 171 respondents answered “yes”.
- 1 respondent answered “no”.
- 2 respondents did not answer this question.

There was strong recognition that a change in the law on its own will not fully address the problem, and the provision of appropriate education was almost unanimously supported.

Respondents' were concerned that:

- the level of relationship and sexual education (RSE) in Northern Ireland is both inadequate and inconsistent;
- without proper education consent can be ill-informed and not well understood;
- the important distinction between consent and compliance out of fear must be highlighted;
- the prevalence of stereotypical myths and the impact of readily available and increasingly violent sexual material online, and their effect on perceptions of what is normal, particularly on younger people; and
- the failure of the criminal justice system to deal effectively with offending encourages others to believe that complaints will be ignored.

It was widely considered that education is needed across the board: for those working in the criminal justice system, including police, prosecutors and judges; for doctors and medical staff; and for the general public. Concern was expressed particularly around judges and juries having sympathy with defendants and a culture of blaming and shaming creating significant barriers to protecting victims. These factors undermine victims' feelings of safety and confidence that their complaints will be listened to.

It was felt that robust education could help victims come forward and be treated sensitively, escaping the shame currently felt; and could lead to prevention of offending at its root. Suggestions included:

- regular, consistent, non-biased, comprehensive age-suitable programmes in school and colleges (suggested from year 10), as well as education at home, to include more on consent, personal space, boundaries, attitude towards partners, use of internet, kink-based sex, porn and same sex relationships;
- education to raise awareness of how things can go wrong, and the possible consequences when they do;
- part of sex offenders' rehabilitation should include education on the issues relating to their offending;
- any public education campaign should feature on TV, social media, billboards, news and radio; and
- working with specialised organisations in developing help and advice so that messaging is sensitive and relevant.

There was widespread concern about the accessibility of porn to children, with one respondent calling for research on where young people's perceptions come from, and another calling for further legislative restrictions on online porn.

A number of respondents referenced the Gillen Review, and called for criminal justice agencies, the legal profession and judges to participate in myth-busting on this traditional taboo and measures to ensure that victims are not re-victimised after making complaints.

Department's Response and Way Forward

The Department acknowledges the need for a robust programme of education, and notes a strong correlation and many areas of direct common interest with work already being taken forward in the Department on the education and awareness recommendations of the Gillen Review.

The Gillen Review Education and Awareness Group will be using the results of an online survey to inform the production of an awareness campaign that will target all of society within Northern Ireland and provide people with the knowledge and tools they need to protect themselves and others from sexual violence.

The Group is also liaising with the Department of Education with a view to implementation of the Gillen Review recommendation that all children and young people, no matter their background, school ethos or ability, and including those not in employment or training, are provided with consistent and uniform age appropriate RSE.

We will work with the Gillen Education and Awareness Group to support the call for consistent and comprehensive RSE, and will join the Group in taking forward the wider education and awareness raising work of the Gillen review.

The Department also notes existing work by the Public Prosecution Service of Northern Ireland and PSNI, who have spearheaded the “No Grey Zone” campaign since 2018; developed bespoke training and a vulnerable witness Continuing Professional Development resource pack; and are currently developing a vulnerable witness training programme. We will liaise with the agencies and judiciary to promote and support training events for the criminal justice family.

Question 4: Do you consider something different is required for Northern Ireland?

- 89 respondents answered “yes”.
- 71 respondents answered “no”.
- 14 respondents did not answer this question.

Many responses to this question repeated or expanded on earlier comments, the majority reiterating that non-fatal strangulation should be included; and many calling for a new Northern Ireland sexual offence, or offences, to deal with death caused by negligent or reckless sexual behaviour and violent sexual abuse. An offence for injuries incurred in intimate consensual sexual relations was also advocated, likened to the offence of causing death by dangerous driving, where a formulated intention does not exist.

Consistency between Northern Ireland and England and Wales was seen as a strength by some, while others urged caution to take account of conservative sensitivity traditionally attitudes exhibited in Northern Ireland. There was a concern that, attitudes in Northern Ireland result in homosexuality being hidden, leading to thrills seeking in other ways - sometimes presenting as dangerous.

Some respondents said that further measures would be needed to ensure any changes worked in practice. Others called for admission of sexual history evidence to be excluded in trials of violent offences, and that the Department should collect data on rough sex to monitor the effectiveness of any change.

There were further calls for:

- less tolerance of pornography,
- age verification for access to online pornography to reduce children's accessibility (but not as a solution to current shortfall in quality age appropriate sex and relationship information); and
- a reminder that, within reason, consensual acts should not be criminalised, risking pushing people away from accessing healthcare and stigmatising alternative sexual practices based on moral judgment.

One respondent commented that the process needs to move more quickly to reduce scope for paramilitary punishments.

Department's Response and Way Forward

The question of creating a new non-fatal strangulation offence and any other sexual violence offence or offences, will be covered in the Department's forthcoming consultation on the issue of non-fatal strangulation.

A specific offence or offences would allow the collection of data to inform future research on the prevalence of rough sex offending. There are currently no mechanisms to measure the extent of the problem within the justice system.

As mentioned above, the use of a person's previous sexual history is an issue the Gillen Review Implementation Team is currently examining. We will continue to work with the Gillen Review team to ensure the views presented in response to our consultation are appropriately represented.

Question 5: Any other comments

There were 37 additional comments, many welcoming the conversation/consultation, supporting the proposals and further emphasising the need for change.

Respondents reiterated the importance of understanding and recognising the significance of the withdrawal of consent. One respondent suggested that proof of consent should be given higher priority than proof of intent in the prosecution of offences where consent was claimed.

One respondent listed cations which would contribute to preventing harm as including: the implementation of Gillen Review recommendations; education; and greater investment in social support. There was some disappointment that the consultation period was not longer. One respondent felt that the questions were leading - they

wanted to ensure that consent to serious harm be outlawed, but also that the outcome of any fatality through reckless sexual activity be managed effectively with victims being protected and sentencing reflecting the crime.

Department's Response and Way Forward

The Department is grateful for all comments received in response to this important consultation, and will take all of these into consideration as we move forward with the proposals set out in this report.

As regards consultation period, the original 8 week consultation period was extended by 1 week on foot of a request received by the Review team. We welcome direct engagement and will try to accommodate requests of this type from respondents. The forthcoming wider review of strangulation will also provide an opportunity for respondents to offer further views.