Consent to serious harm for sexual gratification: not a defence. Response to the Department of Justice public consultation

Public consultation
Consent to serious harm for sexual gratification: not a defence

Submission by Queen's University Belfast School of Law[1]

This is a submission to the Department of Justice, in order to assist their review into '*consent to serious harm for sexual gratification not being a defence'*. The consultation provides that:

> *'In light of the inclusion of the amendment to the Domestic Abuse Bill in England and Wales, and the increased prevalence of the use of the 'Rough Sex' defence, the time is right to have a discussion about the law as it stands in Northern Ireland.*
>
> *We seek your views on whether a change to the law is required and, if so: what the change should be; and whether you think there is a need for a parallel programme of education to address this type of offending at the outset'.*

The consultation sets out four specific questions and this submission will address each consultation question in turn.

1. Do you think the law in Northern Ireland is sufficient as it stands? Please give reasons for your response.

As stated in the consultation document, while there is no explicit legislation on consent to serious harm for sexual gratification in Northern Ireland, the courts in this jurisdiction are bound by the precedent of *R v Brown*.[2] In this section we provide an introduction to this case and the key legal principles to discern whether continued reliance on this case is appropriate.

Consent to harm: R *v Brown* and the search for a legal principle

The judgment of the House of Lords in *R v Brown* forms the basis of the law of consent to assault in Northern Ireland, as elsewhere in the United Kingdom. The defendants in *Brown* were middle-aged men engaging in consensual sadomasochistic bondage/domination, discipline/submission and sadism/masochism (BDSM). Injuries were consented to, even positively desired, for the purposes of sexual gratification. In *Brown*, the following point of law required the answer of the court:

[1] This submission was led by students (Justyna Granacka, Daniel Watson, Rebecca Poots, Meghan Hoyt, Alannah Faulkner, Emer Smyth, Laura Martin Rosemary Cowan, Alexandra Cook, Cameron Chisim, Sara Racicot, Timothy Carson, Antonia Boorman, Nicolas Saddler), supported by Law School staff (Dr Eithne Dowds, Ms. Sarah Craig, Dr Elizabeth Agnew).
[2] [1993] 2 WLR 556.

> Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 and section 47 of the *Offences against the Person Act 1861*?[3]

The Court answered that question in the negative, with the legal principle emerging from the case that consent cannot be raised as a defence to the infliction of harm above and including actual bodily harm (ABH), unless the activity falls within one of the 'general exceptions.' These exceptions not being a closed category, rather they can be added to either by Parliament or the common law in line with the shifting attitudes and values of society. The satisfaction of sadomasochistic desires did not constitute such an exception.

The decision in *Brown* was split 3 to 2, with the majority opinion captured by Lord Templeman:

> Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised. [4]

In the minority, Lord Mustill held that the case was not one concerning the law of assault; but the law of sexual relations[5] - an area of private morality into which the criminal law should not enter lightly. Herein lies the difficultly with the present law flowing from *Brown* relating to consent to serious harm for sexual gratification: it can involve both a consideration, on the one hand, of the public good served by consensual private sexual relations and, on the other, that serious harm to the person, even where that is consented to, lacks social value.[6] This elision of ideas means that the description of an assault can be given a consensual sexual narrative in a bid to lessen the severity of that assault. For example, the so-called 'Fifty Shades of Grey'[7] or 'rough sex' defence.

The parameters of *Brown* were explored in the case of *R v Wilson*,[8] in which a wife consented to her husband (the defendant), using a hot knife to brand his name on her buttocks. However, the wounds became infected and a doctor reported the incident to the police. While the defendant was originally charged with ABH, the charges were later dropped, as the branding,

[3] Ibid at 559.
[4] Ibid at 566.
[5] Ibid at 584.
[6] H Bows and J Herring, 'Getting Away with Murder? A Review of the 'Rough Sex Defence' (2020) 84(6) *Journal of Criminal Law* 525, 528.
[7] HC Deb 2 October 2019, vol 664, col 1278 <https://hansard.parliament.uk/commons/2019-10-02/debates/C3488538-CFEC-4670-9299-732672E2BE67/DomesticAbuseBill> Accessed on 11 December 2020.
[8] [1996] 3 WLR 125.

it was held, was similar to tattooing. *Wilson* has been criticised on the grounds that it confirms the prejudice involved in the reasoning in *Brown*. In *Brown*, Lord Lowry stated that he would not allow an exception for '[s]ado-masochistic homosexual activity,'[9] whereas in *Wilson*, the principle was not deemed applicable because the relationship was that of a married heterosexual couple. Irrespective of that view, *Wilson* shows that the application of *Brown* is not straightforward, causing problems for the current clarity of the law based on that decision. In *Emmett,*[10] however, the Court held that sadomasochistic activity between a heterosexual couple, including suffocation and burning, was not exempt from the legal principle in *Brown* (even when carried out consensually in a domestic relationship).

In *R v Slingsby,*[11] the defendant accidentally cut the victim's vagina with his signet ring, who then developed septicaemia and later died. In *Slingsby* there was no intent to cause harm; whereas in *Brown*, the harm caused was intended and consented to. Part of the case report reads, '[t]he deceased sustained her unfortunate injuries as an accidental consequence of the sexual activity which was taking place with her consent.'[12] Therefore, *Slingsby* distinguishes the legal principle in *Brown* as it did not criminalise lawful activity which results in accidental injury. This is problematic and apt to confusion. By way of an example, B cannot consent to sexual activity with A where that activity involves the deliberate infliction of serious harm (*Brown*) but B can consent to sexual activity that merely carries a risk of such injury (*Slingsby*). In other words, the consensual taking of risks is not criminalised.

In 2013, Steven Lock was charged and then cleared of ABH to his girlfriend, when he tied her up and whipped her, causing bruising to the buttocks and neck.[13] His girlfriend had consented to being whipped as they had read about it in the popular novel *50 Shades Of Grey*, and she had even signed a contract. His defence team analogised with the case of *R v Barnes,*[14] where an amateur footballer seriously injured his opponent and was charged with grievous bodily harm (GBH). The charges were dropped as, generally speaking, footballers play knowing of, and therefore consenting to, the risk of injury. Lock claimed that was what happened in this

[9] [1993] 2 WLR 556 at 583. Emphasis added.
[10] [1999] EWCA Crim 1710.
[11] [1995] Crim LR 570.
[12] Ibid at 571.
[13] 'Fifty Shades' sex-session assault accused cleared', BBC News (London, 22 January 2013) <https://www.bbc.co.uk/news/uk-england-suffolk-21145816> Accessed on 9 December 2020.
[14] [2004] EWCA Crim 3246.

situation, and therefore was similar to a 'mistimed tackle.'[15] Most recently, in *R v BM*,[16] the Court of Appeal declined to extend the general exceptions established in *Brown* to the case of body modification which involved the mutilation of parts of the body. However, the discussion of the law at the beginning of this judgement has the potential to cause confusion, and throws the principle established in *Emmet* into doubt, by asserting that 'consensual activity between married couples is not an area for criminal investigation and prosecution under section 47.'[17]

Critical Discussion of *Brown*

The case of *Brown* and its subsequent application leaves the possibility of consent being raised as a defence to a charge for an offence involving serious assault, murder and/or manslaughter. In the context of a domestically abusive relationship this is particularly problematic, as Herring notes, '[i]n cases where a domestic abuser is charged with assaulting their partner […], explaining the injuries as the results of consensual sadomasochism is one of the few defences available to them […].'[18] Indeed, there is a growing problem of men using the alleged consent of their victims to 'rough sex' as a way to diminish or defend against charges of serious harm or murder. Activist groups such as 'We Can Not Consent to This' (WCCTT) as well as news coverage of recent cases[19] has focused attention on the extent and nature of the problem.[20] WCCTT research indicates that between 1972-2019, there have been 60 cases of so-called 'sex game gone wrong' killings perpetrated by men against their intimate female partners. Academic research also indicates the scale of the problem[21] and the need to seriously address legal 'loopholes' in order to 'shut down this misogyny.'[22]

[15] BBC News (n 13).
[16] [2018] EWCA Crim 560.
[17] Ibid [33].
[18] J Herring, '*R v Brown* (1993)' in P Handler, H Mares and I Williams (eds) *Landmark Cases in Criminal Law* (Hart Publishing 2017) 333, 348.
[19] Recent examples include the murder of British backpacker Grace Millane in New Zealand and of Patrycja Wyrebek in Newry. See: Eleanor Ainge Roy, 'Grace Millane Murder: man jailed for life for killing UK backpacker' *Guardian* (Manchester, 20 February 2020) <https://www.theguardian.com/world/2020/feb/21/grace-millane-man-jailed-for-life-for-killing-of-uk-backpacker> Accessed on 6 December 2020; Kate McCurry, 'Patrycja Wyrebek murder accused claimed 20-year-old died during sex act, court told' *The Irish News* (Belfast, 20 August 2020) <https://www.irishnews.com/news/northernirelandnews/2020/08/06/news/patrycja-wyrebek-murder-accused-claimed-20-year-old-died-during-sex-act-court-told-2028597/> Accessed on 6 December 2020.
[20] We Can't Consent To This, 'What Can be Consented to? Briefing on the Use of "Rough Sex" Defences to Violence' (2019) <https://wecantconsenttothis.uk> Accessed on 5 December 2020.
[21] Bows and Herring (n 6); S Edwards, 'Consent and the 'Rough Sex' Defence in Rape, Murder, Manslaughter and Gross Negligence' (2020) 84(4) *The Journal of Criminal Law* 293-311.
[22] Edwards ibid, 293.

Take for example the recent and horrific case of Natalie Connolly. Ms Connolly (26), died with over 40 injuries, including extensive bruising to the breasts, buttocks and head, a blow-out fracture of the left orbit, and vaginal venous and arterial haemorrhaging.[23] John Broadhurst was charged with her murder; but the prosecution accepted his plea of guilty to gross negligence manslaughter. The case also highlights questionable charging/prosecution practices (which may well arise from the confusing state of the law), as it was not the case of the prosecution that any of the injuries inflicted by Broadhurst on Connolly were unlawful;[24] despite the sentencing judge finding that some were criminally inflicted. *Brown* applied to some injuries but not others.[25] Indeed, the insertion of a bottle of spray carpet cleaner into the vagina was not held to be unlawful. The judge accepted in favour of Broadhurst that Connolly had instigated this extreme request (confirming the difficulties mentioned above with this line of defence where the victim cannot give evidence) and rehearsed the law in this area, citing *Slingsby* as follows:

> A woman may lawfully consent to having something inserted into her vagina (or rectum) for the purposes of sexual gratification but without an intention to cause injury, even if doing so carries a risk of injury, and injury is indeed caused.[26]

Here, it can be seen in practice how distinguishing *Slingsby* from *Brown* carries with it problems. Broadhurst's beating of Connolly so as to cause bruising on her buttocks and breasts was unlawful, applying *Brown*, even with her consent. Yet, his 'grossly irresponsible behaviour'[27] of inserting the bottle into her vagina was not unlawful, despite the risk of serious injury that it surely carried (and did in fact inflict). If legal commentators find this difference baffling,[28] it is sure to cause difficulties in the jury room. The key point then is that the dividing line between the two cases[29] appears to be so porous as to make the task of reframing a case which really concerns assault into one about 'sex games gone wrong'[30] a relatively straightforward one.

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[23] Judiciary of England and Wales, 'R v John Broadhurst: Sentencing Remarks' (17 December 2018) <**Error! Hyperlink reference not valid.**> Accessed on 12 December 2020. In the case itself, it was not clear how Connolly died: from her injuries or as a result of the concentrations of alcohol and cocaine in her blood.
[24] Ibid [22].
[25] Ibid [26].
[26] Ibid [31].
[27] Ibid [32].
[28] Bows and Herring (n 6).
[29] In *Brown* the defendants acknowledged intention to inflict the injuries whereas in *Slingsby* the defendant claimed not to have intended the injury/that the injury was merely a risk, ancillary to the chief motivation of pleasure.
[30] E Yardley, 'The Killing of Women in "Sex Games Gone Wrong': An Analysis of Femicides in Great Britain 2000-2018' (2020) *Violence Against Women* 1-22.

Within this context, the question of consent is central. Yet, consent is an extremely contested social and legal concept. The *Sexual Offences Act (Northern Ireland) Order 2008* is the only statute which defines consent in criminal law: Article 3 describes it as when a person 'agrees by choice, and has the freedom and capacity to make that choice.' However, there is no statutory nor common law definition of consent for (non-sexual) fatal and non-fatal offences against the person, leading Elliot and De Than to suggest that the 'law on consent risks being a patchwork of statute and *ad hoc* case law, without any overarching principle to deal with new situations and different offences.'[31] This is particularly problematic when consent is raised as a defence to harms caused during a sexual interaction, [32] especially due to evidential issues that arise where the victim is deceased and is therefore unable to give evidence regarding the incident and testify on whether they did in fact consent.[33] As will be discussed in more detail in response to question 3 of the consultation, often this defence focuses on the sexual rather than violent aspects of the case and results in a narrative that positions the victim as the responsible party for the events that lead to their death. Rape myths and evidence relating to the victim's previous sexual history are often relied upon by the defence,[34] and even if the defendant is found guilty of murder in 'sex gone wrong' cases, the reputation of a woman becomes the central focus and continues to distort the memory of a victim even after completion of the trial.[35]

In this respect, it is argued that the case law is confusing, and the key points of law are not applied uniformly. Further, a lack of consistency in application has resulted in an increased use of the 'rough sex' defence. The next section turns to consider what a legislative intervention in this area might look like with attention to developments in England and Wales.

2. (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 and Wales?

In the broader context of legislative attempts to enhance the national response to domestic abuse, Clause 65 of the *Domestic Violence Bill* in England and Wales was added in reaction to

[31] C. Elliot, and C. De Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70(2) *Modern Law Review* 225, 225.
[32] Bows and Herring (n 6) 529.
[33] C Nowlin, 'Should Deceased Persons Be Allowed to Raise Self-Defence? A Comment on R v Knibbs' (2011) 43(2) *U.B.C. Law Review* 447-470.
[34] M Iiiadis, 'Victim Representation for Sexual History Evidence in Ireland: A Steep Towards or Away from Meeting Victims' Procedural Justice Needs?' (2019) 20(4) *Criminology and Criminal Justice* 416-432.
[35] C Spohn and J Honey, 'Rape Law Reform and the Effect of Victim Characteristics on Case Processing' (1993) 9 *Journal of Quantitative Criminology* 383-409.

pressure from MPs,[36] activists[37] and the women's sector[38] to address the growing use of a victims alleged consent to 'rough sex', specifically as a way to diminish or defend against charges of serious harm or murder. This section considers whether, in light of the critique of *Brown* above, the addition of Clause 65 to the *Domestic Violence Bill* will provide a more robust legal barrier to the use of consent as a defence to serious harm in cases involving sexual gratification.

Additional support to existing case law

There are three main ways in which Clause 65 provides additional support to the existing case law. The first is an important codification of the common law.[39] Clause 65 places the common law threshold outlined in *Brown* on a statutory footing. In relation to offences under Section 18, 20 and 47 of the *Offences against the Person Act 1861*, the Clause provides that it is 'not a defence that V consented to the infliction of the serious harm for the purposes of obtaining sexual gratification.'[40] Serious harm is defined as grievous bodily harm, wounding or actual bodily harm within the meaning of the *Offences against the Person Act 1861*. Existing common law exceptions are maintained which exempts activities in the public interest such as sporting, tattooing and piercing, surgery and religious ceremonies from criminal prosecution. Clause 65 also contains a statutory exception where the serious harm is the acquisition of an STD.[41] Arguably, creating a statutory threshold provides a more secure and robust commitment to ensuring consent is not capable of being used as a defence to serious harm for sexual gratification.

The second is an important clarification of the common law which, as discussed above, has the potential to be confusing. Following the decision in *R v Wilson*,[42] there was the suggestion that consent to ABH for the purpose of sexual gratification could be relevant within the context of marriage.[43] Bows and Herring point to the fact some case law suggests where serious harm for the purpose of sexual gratification occurs within the context of a marriage, there is a question

[36] Harriet Harman MP and Mark Garnier MP.
[37] We Can't Consent to This (n 20).
[38] Women's Aid Federation England, 'Joint Evidence on the Domestic Abuse Bill' < **Error! Hyperlink reference not valid.**> Accessed on 6 December 2020.
[39] Bows and Herring (n 6) 535.
[40] Domestic Abuse Bill Clause 65, s. 2.
[41] Ibid s. 4.
[42] *Wilson* (n 8).
[43] Bows and Herring (n 6) 535.

as to whether it is covered by *Brown.*[44] In W*ilson,*[45] the conviction for ABH was overturned because 'consensual activity between husband and wife, in the privacy of their matrimonial home, was not a matter for criminal investigation or prosecution.'[46] Write J's comments in *R v Emmett*[47] seemed to confirm *Brown*[48] still applied to sexual gratification within a marriage, maintaining that there was no reason to draw 'any distinction between sadomasochistic activity on a heterosexual basis and that which is conducted in a homosexual context.'[49] However, the recent case of *BM,*[50] as noted above, seemed to contradict the ruling in *Emmett*.[51] Placing this prohibition within a legislative framework could alleviate this uncertainty.

The third is symbolism. The criminal justice system is often framed as ameliorating the lives of citizens and protecting them from harm.[52] The addition of this amendment to the *Domestic Abuse Bill* occurred in the context of pressure from lobby groups to address the growing use of 'consent to rough sex' being used to reduce sentences for perpetrators involved in the serious assault, or death of sexual partners.[53] The inclusion of the amendment in the *Domestic Abuse Bill* is perhaps, at least, symbolically important as a demonstration that the law views this behaviour as unacceptable and that the legislative process can be collaborative and take on the concerns of different groups within society.

Remaining challenges

Despite the additional support Clause 65 provides, numerous issues remain. The first being that the amendment will not have the desired effect. Jonathan Rodger argues that while Clause 65 might appear to address the concerns of WCCTT by removing the defendant's ability to claim that a victim consented to serious harm, in reality it does not.[54] Rodger maintains that consent has never acted as a 'defence' to murder or serious harm, rather it has been used to establish whether the defendant 'foresaw any risk of injury.'[55] Evidence of the defendant's intent to

[44] *Brown* (n 2).
[45] *Wilson* (n 8).
[46] Bows and Herring, (n 6) 535.
[47] *Emmett* (n 10).
[48] *Brown* (n 2).
[49] Ibid [4].
[50] BM (n 16).
[51] Ibid [33].
[52] C Barlow et al, 'Putting coercive control into practice: problems and possibilities' (2020) 60(1) *British Journal of Criminology* 160.
[53] We Can't Consent To This (n 20).
[54] J Rogers, '"Abolition" of the "Rough Sex" Defence: Hurried Legislation and Missed Opportunities' (2020) <http://www.clrnn.co.uk/blog/law-reform-general/> Accessed on 6 December 2020.
[55] Ibid.

cause serious harm or the extent to which serious harm was foreseeable, will remain relevant to offences against the person offences, despite Clause 65.

Second, the law on consent remains ambiguous. A complicating factor in the functioning of Clause 65 is the 'the lack of consistency in the conceptual boundaries and definitions of consent across criminal law.'[56] As noted above, though the *Sexual Offences Act 2003* provides a statutory definition of consent, it is only relevant to offences within the 2003 Act. It is *Brown*[57] which provides the leading authority on consent regarding violent offences against the person. The lack of clarity and consistency regarding the function of consent within offences against the person[58] should be addressed more directly and statutory definitions should be created for the avoidance of doubt.

Third, the law fails to acknowledge the gendered harm. Clause 65 makes no reference to the fact that while it is possible for both men and women to experience serious harm in the pursuit of sexual gratification, every known killer in the UK who has used the defence of a 'sex game gone wrong' is male.[59] The gendered nature of this problem must be acknowledged if it is to be tackled without inadvertently criminalising sex-workers and the BDSM industry.[60] This point will be elaborated upon in the response to question 3 below.

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

In its current form, the amendment applies only to three offences (s18, s20 and s47) within the *Offences against the Person Act 1861*. This allows some offences to remain outside the scope of Clause 65, creating a damaging disparity. For example, Section 21 *Offences against the Person Act 1861* (strangulation or choking) is not included within the scope of Clause 65. While, presumably *Brown*[61] would continue to apply in this context, it does suggest that the amendment is not as comprehensive as it could be in protecting against the use of consent as a defence in the context of sexual gratification. Some activists maintain the need for a stand-alone offence of Non-Fatal Strangulation to underscore the potential for harm.[62]

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[56] Bows and Herring (n 6) 528.
[57] *Brown* (n 2).
[58] Bows and Herring (n 6) 528.
[59] We Can't Consent to This (n 20).
[60] Rogers (n 54).
[61] *Brown* (n 2).
[62] Centre for Women's Justice, 'Submission to the Domestic Abuse Bill Committee' (21 May 2020) <https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/5ec69e2d6bbca20d0d49acb7/1590074927743/CWJ+non-fatal+strangulation.Committee+briefing.21.5.20.pdf> Accessed on 5 December 2020.

The proposed amendment should be added to the *Domestic Abuse Bill* – but only on the understanding that this is not legal reform, but merely a confirmation of the status-quo. In order to seriously address this pressing social issue, Clause 65 should be extended to cover more offences, the legal standing of consent must be reconsidered and clarified, and damaging patriarchal myths which understand women to be complicit in their own harm[63] must be comprehensively challenged. In light of this, the next section turns to consider whether educational initiatives should be established to complement any legislative intervention.

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?***

Context: the nature of BDSM and defence narratives

Rough sex or BDSM has progressively pervaded Western popular Culture, particularly in the past decade, while extreme pornography portraying BDSM themes has become easily accessible online.[64] However, greater acceptance and tolerance of both idealised mainstream representations of BDSM and violent misogynistic pornographic tropes, combined with widespread ignorance of BDSM philosophy and practices, creates opportunities for exploitation in court.[65]

As noted above, an increasing number of male defendants are attempting to absolve themselves of responsibility for serious injuries and deaths, usually of women, by claiming these resulted from consensual BDSM sexual activity.[66] This must be set in the context of extensive global violence against women, including the highly gendered nature of intimate partner abuse, domestic homicide and sexual violence, all largely perpetrated by men against

[63] Edwards (n 21) 295.

[64] J Monckton-Smith, *Murder, Gender and the Media: Narratives of Dangerous Love* (Palgrave Macmillan 2012); JMW Kratzer (ed), *Understanding the Influence of the Fifty Shades of Grey Phenomenon* (Lexington Books 2020) 10.

[65] S Edwards, 'Assault, Strangulation and Murder – Challenging the Sexual Libido Consent Narrative' in A Reed, M Bohlander (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017) 88-103; C Gallant and A Zanin, 'The Bogus BDSM Defence' in KA Malinen (ed), *Dis/Consent: Perspectives on Sexual Consent and Sexual Violence* (Fernwood 2019) 32, 37.

[66] There has been a 90 per cent increase in use of the 'rough sex defence' in England and Wales since 2010, according to campaign group. We Can't Consent To This (n 20).

women.[67] Recent studies show that significantly more men than women are aroused by fetishism and sadism, many women have participated in so-called 'rough sex' unwillingly, and numerous men have engaged in violent sexual behaviour to which their female partners have not consented.[68]

Many defendants accused of sexual violence against women rely on rape myths, based on patriarchal cultural scripts and sadomasochistic narratives that excuse cruelty and abuse by claiming women want 'rough sex.'[69] When the woman concerned is dead, she is completely voiceless, unable to offer any testimony to contradict these scripts, the power of which may be amplified by false perceptions about BDSM. Alternative verdicts of manslaughter or grievous bodily harm are available to murder trial juries, and more defence counsel are now using 'rough sex' narratives to try to persuade judges and jurors that any death or potential injury resulting from the defendant's actions was accidental or due to carelessness rather than intent.[70] For example, strangulation was the cause of death in two-thirds of 'rough sex defence' cases in recent years, but it is also the primary method of killing an intimate female partner in a heterosexual relationship over the last three decades.[71] While strangulation does not always kill, defence counsel often reframe it as 'pressure to the neck,' 'squeezing' or 'pushing down' to euphemise the defendant's behaviour into a less serious form of violence.[72] Therefore, even

[67] R Pain, 'Everyday Terrorism: Connecting Domestic Violence and Global Terrorism' (2014) 38(4) Progress in Human Geography 531; <https://theconversation.com/factcheck-is-domestic-violence-the-leading-preventable-cause-of-death-and-and-illness-for-women-aged-18-to-44-94102> Accessed on 3 December 2020. Home Office, *Domestic Homicide Reviews: Key Findings from Analysis* (Home Office 2016) <**Error! Hyperlink reference not valid.**> Accessed on 3 December 2020; Crime Survey for England and Wales, *Domestic Abuse Victim Characteristics, England and Wales: Year Ending March 2019* (Office for National Statistics 2019) <www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2019#sex> Accessed on 3 December 2020.

[68] J Richters, RO De Visser, CE Rissel, AE Grulich and AMA Smith, 'Demographic and Psychosocial Features of Participants in Bondage and Discipline, Sadomasochism and Submission (BDSM): Date from a National Survey' (2008) 5(7) Journal of Sexual Medicine 1660-1668; A Brown, E.D Barker and Q Rahman, 'A Systematic Scoping Review of the Prevalence, Etiological, Psychological, and Interpersonal Factors Associated with BDSM' (2020) 57(6) *The Journal of Sex Research* 781-811; 'Women are being strangled, chocked, slapped and spat on during sex – we need to stop pretending this is normal', The Telegraph (London, 3 March 2020) <**Error! Hyperlink reference not valid.**> Accessed on 9 December 2020.

[69] G Bohner, F Eyssel, A Pina, F Siebler and GT Viki, 'Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator' in M Horvath and J Brown (eds), *Rape: Challenging Contemporary Thinking* (Willan 2009) 17, 18; Edwards (n 65) 88; JM Gray and MH Horvath, 'Rape Myths in the Criminal Justice System' in E Milne, K Brennan, N South and J Turton (eds), *Women and the Criminal Justice System: Failing Victims and Offenders* (Palgrave Macmillan 2018) 15.

[70] Criminal Law Act (Northern Ireland) 1967, s 6(4)(a); Edwards (n 21).

[71] Edwards (n 21); A Moore and C Khan, 'The Fateful, Hateful Rise of Choking During Sex' *The Guardian* (London, 25 July 2019) <https://www.theguardian.com/society/2019/jul/25/fatal-hateful-rise-of-choking-during-sex> Accessed on 3 December 2020; Bow and Herring (n 6) 526.

[72] Bows and Herring (n 6) 528.

if legislation is amended to explicitly reflect common law, that an individual cannot consent to a sexual act which causes death or serious harm, juries which believe that a complainant consented to a dangerous sexual act are more likely to acquit defendants on the grounds that they lacked the necessary *mens rea* for murder.[73]

Thus, outsiders' ignorance of BDSM culture and practices leaves many legal professionals and jurors vulnerable to erroneous assumptions.[74] Busby claims that '[j]udges' contextual analyses would be stronger if the extreme dangers of erotic asphyxiation were taken more seriously, and they had a better understanding of safe, sane and consensual practices.'[75] Erotic asphyxiation, non-fatal strangulation for sexual pleasure, is often incorrectly portrayed as a common feature of BDSM. Yet, like other dangerous and controversial activities, it is considered 'edgeplay,' at the limits of acceptability within BDSM.[76] Contrary to popular belief, most BDSM practitioners are generally risk-adverse and follow strict rules, usually avoiding intoxication or loss of control, whilst communication, consent and safety are key.[77] The BDSM community endorses a strong culture of clear, affirmative, ongoing consent, advocating guidelines which ensure that no participant forces another beyond their limits and creating the difference between BDSM and abuse.[78] BDSM participants commonly negotiate boundaries in advance, deciding what activities they are willing to engage in and to what degree of pain. They usually agree a safe word (selecting a word not normally used in this context), which, when spoken by any participant indicates immediate retraction of their consent and signals that activities should cease immediately.[79] It is also important for participants to check in with one another to ensure they are still enjoying the activities.

Moreover, the purpose of erotic asphyxiation in genuine BDSM, namely, 'light headedness that comes when one is taken to the point of unconsciousness, but not past it' is also frequently misconstrued.[80] Once someone is unconscious, consent can no longer be given, safe words can

[73] *Brown* (n 2); Bows and Herring (n 6) 529.
[74] K Busby, 'Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions' (2012) 24(2) Canadian Journal of Women and Law 328, 346.
[75] Ibid, 352.
[76] S Newmahr, *Playing on the Edge: Sadomasochism, Risk and Intimacy* (Indiana University Press 2011) 147.
[77] M Weiss, *Techniques of Pleasure: BDSM and the Circuits of Sexuality* (Duke University Press 2011) Ch 2; A Fanghanel, *Disrupting Rape Culture: Public Space, Sexuality and Revolt* (Bristol University Press 2019) 116.
[78] Busby (n 74) 340.
[79] T Bennett, 'A Fine Line Between Pleasure and Pain: Would Decriminalising BDSM Permit Non-consensual Abuse?' [2020] *Liverpool Law Review* 1, 12.
[80] Busby (n 74) 339.

no longer be communicated, and one can easily take advantage of someone in such a vulnerable position. People can die when sadomasochistic encounters go too far, therefore, safe words, communication, and check-ins are crucial.[81] Genuine BDSM practitioners value knowledge-sharing and some BDSM communities hold workshops, where experienced participants mentor newcomers on safe techniques and basic medical knowledge, while aftercare, such as hydration, sustenance, quiet, physical contact, is also promoted.[82]

The importance of education

In light of the preceding section it is apparent that all professionals involved in the investigation and prosecution of 'rough sex' cases would benefit from more knowledge about BDSM, and domestic abuse and coercive control - victims of which may contradict statements through fear of their abusers.[83] It is vital police know the appropriate questions to ask alleged victims, but also of suspects. This would include inquiring whether negotiations on BDSM activity took place and what they covered; what limits were set; if a safe word was agreed and used; whether checking-in took place; and what steps participants took to minimise potential risks.[84]

Counsel and judges should also receive training: prosecutors particularly would benefit from specialist psychological coaching in how to robustly challenge defence counsel's use of rape myths and BDSM narratives.[85] Juror training, guidelines and expert witnesses on rape myths, intimate partner violence, coercive control and BDSM may also prove useful. The recommendations contained within the 2019 Gillen Review for brief training on rape myths for jurors in sexual offences trials in Northern Ireland, perhaps a concise 30-minute video and written judicial guidelines, could be adapted and extended to jurors in all trials in which the defendant is claiming a 'rough sex' defence.[86] The issue of expert witnesses is more contested

[81] C Hanna, 'Sex is Not a Sport: Consent and Violence in Criminal Law' (2001) 42(2) *Boston College Law Review* 239.
[82] Bennett (n 78) 12.
[83] The Serious Crime Act (2015) s76 England and Wales legislation on coercive control is to be extended to Northern Ireland in the forthcoming Domestic Abuse Bill; *R v Challen* [2019] ECWA Crim 916; E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007); S Pegg, 'BDSM: When is Sadomasochism an Act of Domestic Violence?' (The Conversation 2018) <http://theconversation.com/bdsm-when-is-sadomasochism-an-act-of-domestic-violence-108376> Accessed on 3 December 2020.
[84] Bennett (n 79) 13.
[85] N Burrowes, *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (NB Research, March 2013) <http://nb-research.com/wp-content/uploads/2013/04/Responding-to-the-challenge-of-rape-myths-in-court_Nina-Burrowes.pdf> Accessed on 3 December 2020 5, 12, 20, 24.
[86] J Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Ministry of Justice NI 2019) <www.justice-ni.gov.uk/publications/gillen-review-report-law-and-procedures-serious-sexual-offences-ni> Accessed on 3 December 2020.

and open to fears of costly battles between opposing professionals testifying for defence and prosecution; nevertheless, they could be considered on an individual case-by-case basis.[87] However, any judicial directions, jury education and expert testimony must be neutral and non-case specific, hence, their impact could be weakened by a skilled defence argument tailored to specific case facts - thus, training prosecutors to refute rape myths is key.[88]

In addition to education on BDSM, domestic abuse and coercive control training should also cover consent. Although the legislative parameters of consent within the context of offences against the person require attention, work can still be undertaken from an educational perspective drawing on the rich literature that has developed on sexual consent. The affirmative model of consent emphasises communication and requires active signals of agreement before an encounter is to be considered consensual, similar to the active affirmations used in safe, consensual BDSM.[89] Crucially, affirmative consent is active, clearly sought and received and manifested through positive words or action, not implied from dress or previous conduct, and most importantly, it is ongoing and can be withdrawn at any point.[90] Consent under this approach is a 'performative act, rather than a state of mind, and if there is no positive affirmation on the part of the complainant there can be no consent and no reasonable belief in consent.'[91] The use of this model would help protect victims of domestic abuse and violence, making it harder for defendants who did not receive proper consent or who did not respect withdrawal of consent to justify their actions.

However, as acknowledged by Sir John Gillen in his recent report on sexual offences, the problem of belief in rape myths, and thus susceptibility to false BDSM scripts, is wider than the criminal justice system.[92] Northern Ireland is an acutely patriarchal and deeply morally conservative society, whose judgmental attitude to sexual matters can ultimately lead to ignorance and victim-blaming.[93] Beyond the biological facts, sex education in Northern Irish

[87] J Horn, 'Fifty Shades of Oppression: Sadomasochism, Feminism and the Law' (2015) 4(1) DePaul Journal of Women, Gender and the Law 1, 32; Gillen (n 86)
[88] Burrowes (n 85).
[89] See, E Dowds, *Sexual Consent in Northern Ireland: The Social and Legal Dimensions* (Queen's University Belfast 2020) Queen's Policy Engagement: Policy Paper 6 <www.http://qpol.qub.ac.uk> Accessed on 3 December 2020 1, 2.
[90] Ibid at 4.
[91] Ibid.
[92] Gillen (n 86).
[93] N Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005) 231, 232; L McCormick, *Regulating Sexuality: Women in Twentieth-Century Northern Ireland* (Manchester University Press 2009); PJ Maginn and G

schools is left to the discretion of individual schools, which, due to religious influence and pressure from parents, may omit highly relevant topics and curtail open discussion.[94] Parents may also request that their child be withdrawn from the sexual education programme altogether.[95] Northern Ireland is therefore not meeting international recommendations to ensure that all adolescent girls and boys receive accurate and suitable information to safeguard their health and development 'which should include information on safe and respectful social and sexual behaviours.'[96] Hence, well-funded public and age-appropriate school campaigns, such as the Gillen report recommends to combat rape myths, may also be useful to highlight issues around consent and safe sex.[97]

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

As specified in the consultation outline and above, consent to GBH as a defence should not necessarily be outlawed for cases where low-level seriousness of harm occurs,[98] yet there still is a need to have clearly defined boundaries and limits. For this reason, we propose clearly and explicitly defining consent based upon the affirmative approach to consent as outlined in the previous section. Clarifying and defining limits on the use of consent as a defence will enable prosecutors to identify and separate intentional killings from accidental harms, filtering out those with criminal intent from those where minor harms have resulted from consensual sexual activity.

We propose that consent to ***serious harm*** for sexual gratification, as any form of defence, should be outlawed in circumstances where the victim:

- Dies as a result of injuries sustained during 'rough sex'.
- Is left with life-altering injuries sustained during 'rough sex'.
- Is unconscious during 'rough sex'.

Ellison, '"Ulster Says No": Regulating the Consumption of Commercial Sexual Spaces and Services in Northern Ireland' (2017) 54 *Urban Studies* 806.

[94] Education (Curriculum Minimum Content) Order (Northern Ireland) 2007; B Rolston, D Schubotz and A Simpson, 'Sex Education in Northern Ireland Schools: A Critical Evaluation' (2005) 5(3) Sex Education 217.

[95] L Lundy, L Emerson, K Lloyd, B Byrne and J Yohanis, *Education Reform in Northern Ireland: A Human Rights Review* (Northern Ireland Human Rights Commission 2012) 25.

[96] United Nations Committee on the Rights of the Child, 'Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (UN Office of the High Commissioner Human Rights 2003) CRC/GC/2003/4, [26] <www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC4.pdf> Accessed on 3 December 2020.

[97] Gillen (n 86).

[98] Department of Justice '*Consent to Serious Harm for Sexual Gratification: Not a Defence'* (November 2020), 10.

In addition and as clarified above, we propose improving social and public education within Northern Ireland on consent, boundaries and safe 'rough' sex (i.e., BDSM) including: (i) the expansion of secondary school **education**, including sexual health and relationship education (RSE); (ii) increasing **access to information** i.e. internet sources, educational courses, etc., to dissolve the taboo aspect of BDSM so that more conversations on safe practices become the norm; and (iii) providing resources to the **victims of sexual violence**, focusing on why victims of sexual violence do not report perpetrators.

Interrelated and importantly, research carried out by Savanta ComRes, as outlined in the Consultation document, shows that 38% of women surveyed had experienced slapping, choking, gagging, or spitting during consensual sex, and that at least some of the time this was unwanted, indicates a significant and concerning attitude to sex among a younger demographic.[99] It is also clear that this is a rising, rather than falling (or static) figure. Accordingly, what we might term 'counter-education' should, of necessity, be a component of the DOJ's legislative plan. Research needs to be undertaken to identify: (i) precisely where these impressions of sex are acquired by young people; (ii) why they are increasingly pervasive; and (iii) the dynamics that commonly underpin them in sexual relationships.

The Offence of Non-Fatal Strangulation

Building on the discussion in response to question 2, we draw particular attention to the offence of non-fatal strangulation and propose that any new legislation explicitly address this offence. In 50 years, there have been approximately 60 cases where women in the UK were killed by a man who claimed it was a sex act gone wrong. Two-thirds of the women were strangled. This is around 3 times higher than the average rate of strangulation in the killing of women in other contexts.[100] Northern Ireland has an opportunity to lead by example by enacting legislation to cover explicitly the offence of non-fatal strangulation. 'New Clause 8' was previously proposed in the House of Commons:

[99] Department of Justice (n 98), 7.

[100] We Can't Consent To This, 'What can be consented to? Briefing on the use of "rough sex" defences to violence' (February 2020) <https://static1.squarespace.com/static/5c49b798e749409bfb9b6ef2/t/5e4da72920c08f54b94d91e4/1582147383202/WCCTT+briefing+sheet+2020+February.pdf> Accessed on 6 December 2020 1, 2.

> A person (A) commits an offence if that person unlawfully strangles, suffocates, or asphyxiates another person (B), where the strangulation, suffocation, or asphyxiation does not result in B's death.[101]

In Northern Ireland, organisations including Women's Aid, HERe NI, Women's Policy Group, Women's Resource and Development Agency, Relate NI, and MAP have highlighted that there is no specific legal means to adequately tackle non-fatal strangulation and choking offences, and have called for the legal framework to be strengthened and a specific criminal offence introduced.[102] Similarly, the South Eastern Domestic and Sexual Violence Partnership have registered concerns that the 'rough sex' defence is 'increasingly used in Domestic Homicides to explain a death' and that 'acts of non-fatal strangulation are explained as consensual acts and yet women are predominantly the victims and held responsible.'[103]

Section 21 of the *Offences against the Person Act 1861* contains the offence of attempting to choke, suffocate or strangle, though only when the act is committed in the commission of another offence. In the majority of cases, prosecutions can only be brought for an assault offence. The lack of observable injuries means that offenders' conduct is often minimised, and they are charged with common assault rather than ABH or GBH.[104] In making the case for similar legislation, which was enacted in 2018, the Law Commission of New Zealand stated that, since its charging practice was clearly inadequate, a new offence would be a more effective criminal sanction than the existing options.[105]

As the dominant cause of death in cases where the 'rough sex' defence has been used, the enactment of specific legislation on the offence of non-fatal strangulation would go some way to: (i) recognising strangulation as a serious offence; (ii) dissuading would-be offenders; (iii) protecting vulnerable survivors by enabling them to bring charges against their assailants; and

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[101] House of Commons, Hansard Domestic Abuse Bill (Tenth sitting) Debated on Tuesday 16 June 2020, <https://hansard.parliament.uk/Commons/2020-06-16/debates/3fa90c32-4bc5-4477-ab1e-aaf665da56e6/DomesticAbuseBill(TenthSitting)> Accessed 21 December 2020.

[102] Committee for Justice, 'Report on the Domestic Abuse and Family Proceedings Bill' (2020) Northern Ireland Assembly 48/17-22, [636]. <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/justice/reports/domestic-abuse-and-family-proceedings-bill/ > Accessed on 6 December 2020,

[103] Ibid, [639].

[104] Written evidence submitted by the Centre for Women's Justice (DAB06) (2020) UK Parliament: submission to Domestic Abuse Bill Committee, [11]. <https://publications.parliament.uk/pa/cm5801/cmpublic/DomesticAbuse/ memo/DAB06.pdf> accessed 6 December 2020.

[105] The Law Commission of New Zealand, 'Strangulation: The Case for a New Offence' (2016) [1.18] <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R138.pdf> Accessed on 6 December 2020

(iv) increasing public awareness of the issue, particularly in light of the potential long-term medical effects precipitated by non-fatal strangulation. Unpacking the latter issue, although there is little or no visible injury, numerous longer-term effects of strangulation include fractured trachea/larynx, internal bleeding, tinnitus, neurological injuries, PTSD, depression, and stroke.[106] It may also prevent fatal harm to survivors by the same perpetrators in the future.

[106] Written evidence submitted by the Centre for Women's Justice (n 104) [7].