NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Response to the Department of Justice Consultation on Consent to Serious Harm for Sexual Gratification: Not a Defence

January 2021

Table of Contents

Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

2.14 recommends that the Department of Justice introduces legislation that removes the defence of consent to serious harm for sexual gratification. It is suggested that consideration is given to the wording used in the England and Wales Domestic Abuse Bill.

3.17 recommends that the proposed legislation should include an element that protects against gender-based violence, using the UN CEDAW, UN CAT and Istanbul Convention as a guide.

4.8 recommends that the Department of Justice works with the Department of Education to provide a parallel programme for education alongside the legislation. The NIHRC recommends that the programme for education specifically references human rights standards and considers recommendations of the UN CEDAW Committee and Gillen Review.

4.9 continues to call on the UK Government and NI Executive to fulfil their obligations outlined in the NI (Executive Formation etc) Act 2019. The NIHRC continues to recommend the introduction age appropriate and scientifically based reproductive and sexual health education that addresses the meaning of consent, healthy relationships and prevention of gender based violence. This will require cross departmental collaboration.

5.4 recommends the Department of Justice brings forward appropriate legislative change as soon as is practicable for non-fatal strangulation to be regarded as a standalone offence. Any legislative change should be clear that the defence of consent to harm for sexual gratification can no longer be used.

5.6 recommends that the Department of Justice takes effective steps to promptly implement the recommendations of the Gillen Review in Northern Ireland. In particular, recommendations 6 and 9, which would assist in dispelling the rough sex defence narrative used by perpetrators.

5.8	**recommends the Department of Justice gathers disaggregated, comprehensive data on the use of the rough sex defence in Northern Ireland and that this data is published in accessible formats and effectively monitored. This data should be used to identify areas where further research is required and be used to establish the effectiveness of the law and whether further measures, training or guidelines are required.**

1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with this function, the following advice is submitted in response to Department of Justice's consultation on consent to serious harm for sexual gratification.

1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:

- European Convention on Human Rights (ECHR);[1]
- CoE Convention on Preventing and Combating Violence against Women (Istanbul Convention);[2]
- UN Convention on Civil and Political Rights (UN ICCPR);[3]
- UN Convention on Elimination of Discrimination against Women (UN CEDAW);[4]
- UN Convention against Torture (UN CAT);[5]
- UN Convention on the Rights of the Child (UN CRC);[6] and
- UN Convention on the Rights of Persons with Disabilities (UN CRPD).[7]

1.3 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include:

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[1] Ratified by the UK 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).
[2] Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 11 April 2011.
[3] Ratified by the UK 1966.
[4] Ratified by the UK 1986.
[5] Ratified by the UK 1988.
[6] Ratified by the UK 1989.
[7] Ratified by the UK in 2009.

- UN CAT Committee Concluding Observations 2019;[8]
- UN CEDAW Committee Concluding Observations 2019;[9]
- UN CEDAW Committee General Recommendation No 35;[10]
- UN Human Rights Committee General Comment No 32;[11] and
- UN Declaration on the Elimination of Violence against Women.[12]

1.4 The NIHRC welcomes the introduction of legislation to outlaw consent to serious harm for sexual gratification in trials as a defence and welcomes the opportunity to provide advice on the creation of new legislation.

2.0 Removal of the defence

2.1 Articles 2 ECHR protects the right to life and Article 3 ECHR protects freedom from torture, cruel, inhuman or degrading treatment and punishment.[13] The European Court of Human Rights (ECtHR) has been clear that these provisions contain positive obligations to ensure these fundamental rights are protected.

2.2 The ECtHR has provided that there are positive obligations under Article 2 ECHR to take appropriate steps to safeguard the lives of those within its jurisdiction to apply in the context of any activity, whether public or not, in which the right to life may be at stake.[14] This requires public authorities to take reasonable steps when they know of or ought to have known of real and immediate threats to life, including by a third party non-State actor.[15] Article 3 ECHR is an absolute right which provides that this right must never be interfered with under any circumstances.[16]

2.3 Article 8 ECHR ensures protection of a private and family life.[17] It is a qualified right, which means limitations are allowed if they are "in accordance with the law" and are "necessary in a democratic society" for

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[8] CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019.
[9] CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019.
[10] CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35:Gender-based V against Women', 26 July 2017.
[11] CCPR/C/GC/32, 'UN Human Rights Committee General Comment No 32: Article 14 on the Right to Equality Before the Courts and Tribunals and to a Fair Trial', 23 August 2007, at para 29.
[12] UN General Assembly, 'Declaration on the Elimination of Violence against Women', 20 December 1993.
[13] Article 2 ECHR; Article 3 ECHR.
[14] *Case of Centre for Legal Resources on Behalf of Valentin Campeanu v Romania* (2014) ECHR 14.
[15] *Osman v UK* (1998) ECHR 101, at para 116.
[16] *Chahal v UK* (1996) ECHR 413.
[17] Article 8 ECHR; Article 14 ECHR.

the protection of one of the objectives set out in Article 8(2) ECHR, in this instance "for the prevention of disorder or crime" and "the protection of the rights and freedoms of others" The ECtHR clarified that "necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable" but implies the existence of a "pressing social need" for the interference in question.[18]

2.4 The ECtHR has held that the State has a responsibility to protect individuals from violence by third parties. This has been particularly true in cases involving victims of domestic violence. While there are often violations of Articles 2 and 3 ECHR in such cases, Article 8 ECHR is also applied because violence threatens the bodily integrity aspect of the right to respect for private life.[19] Under Article 8 ECHR, States have a duty to protect the physical and moral integrity of an individual from other persons, which requires affording protection against acts of violence by private individuals.[20]

2.5 The ECtHR has provided that safeguarding physical integrity under Article 8 ECHR requires an effective criminal investigation.[21] Compliance with Article 8 ECHR in the sphere of protection against acts of individuals is within the State's margin of appreciation, yet effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions.[22]

2.6 Specific to rape, the ECtHR has clarified that the State has a positive obligation under Articles 3 and 8 ECHR to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.[23] For example, in *MC v Bulgaria* (2003) the applicant, who was a girl aged 14 (which was the age of consent for sexual intercourse in Bulgaria), was raped by two men. However, it could not be established that she had resisted or called for help and the perpetrators were not prosecuted. The ECtHR considered that Bulgaria had not satisfied its positive obligation to effectively investigate, punish and prosecute the rape, finding a violation of Article 3 ECHR and Article 8 ECHR. The ECtHR stated:

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[18] *Dudgeon v UK* (1981) ECHR 22.
[19] *Milićević v Montenegro* (2018) ECHR 6; *ES. and Others v. Slovakia* (2009).
[20] *Sandra Janković v. Croatia* (2008) ECHR 24.
[21] *MC v Bulgaria* (2003) ECHR 646.
[22] *MC v Bulgaria* (2003) ECHR 646, at para 166.
[23] *MC v Bulgaria* (2003) ECHR 646.

> that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.[24]

2.7 The ECtHR noted in particular the universal trend towards recognising lack of consent as the essential element in determining rape and sexual abuse. Victims of sexual abuse, especially young girls, often fail to resist for psychological reasons (either submitting passively or dissociating themselves from the rape) or for fear of further violence. The ECtHR stressed that States had an obligation to prosecute any non-consensual sexual act, even where the victim had not resisted physically.[25]

2.8 Furthermore, in the ECtHR cases *MA v Slovenia* (2015) and *ND v Slovenia* (2015), the applicants complained that Slovenia had failed to provide an effective system of prosecution and trial against the men whom they had accused of rape, the related proceedings having lasted some 26 years in the first case and over nine years in the second case. In both cases the ECtHR held that there had been a procedural violation of Article 3 ECHR, finding that the criminal proceedings regarding the applicants' rape did not comply with the procedural requirements imposed by Article 3 ECHR.[26] Although the cases deal with the length of time regarding the trial proceedings, the judgement is still of relevance. The ECtHR stated that the ECHR requirements relating to the effectiveness of an investigation, that any investigation should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible for an offence.[27]

2.9 Each of the ECtHR cases conveys the potential for trial proceedings to be

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[24] *MC v Bulgaria* (2003), ECHR 646 at para 166.
[25] *MC v Bulgaria* (2003), ECHR 646.
[26] *MA v Slovenia* (2015) ECHR 31; *ND v Slovenia* (2015) ECHR 15.
[27] *MA v Slovenia* (2015) ECHR 31 at para 47.

ruled as incompatible with Article 3 ECHR where the defence of consent to serious harm for sexual gratification is used, as consent cannot be provided in cases of serious harm or worse. The ECtHR stated:

> while in practice it may sometimes be difficult to prove lack of consent in the absence of "direct" proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent.[28]

2.10 It has been reported that 67 people in the UK have been killed as a result of violence that has been deemed consensual for sexual gratification under what has been referred to as the rough sex defence.[29] There is no data available specific to Northern Ireland, however, it is clear that the use of the defence, which enables the perpetrator to negotiate and receive lesser charges or a lighter sentence, is a persistent issue.

2.11 In England and Wales, the current draft of the Domestic Abuse Bill includes a provision that where a person inflicts serious harm on another person and is guilty of a relevant offence, it is not a defence that the individual consented to the infliction of the serious harm for the purposes of obtaining sexual gratification. If this amendment is retained and the Domestic Abuse Bill is given Royal Assent, this legislation will clarify the law in England and Wales and transfer into statute the legal principle established in the case of *R v Brown* (1993),[30] that a person cannot consent to actual bodily harm or to other more serious injury or, by extension, to their own death. A similar provision is not included within the equivalent proposed legislation in Northern Ireland – the Domestic Abuse and Family Proceedings Bill, which indicates the need for the legislation being proposed by this consultation.

2.12 Currently in Northern Ireland, judges rely on the judgement of *R v Brown* (1993). In this case, five men were convicted on various counts, including assault causing actual bodily harm and wounding under the Offences against the Person Act 1861.[31] The injuries in question occurred during

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[28] *MC v Bulgaria* (2003), ECHR 646 at para 181.
[29] House of Commons Public Bill Committee, 'Evidence for the Public Bill Committee - We Can't Consent To This - Domestic Abuse Bill 2019-21' (HoC, 2020).
[30] *R v Brown* (1993) UKHL 19.
[31] *R v Brown* (1993) UKHL 19.

consensual homosexual sadomasochistic activities. The case of *R v Brown* has since set the legal precedent that victims' consent to serious harm for sexual gratification is not a defence and does not serve as a defence where such sexual activity resulted in the victim's death. The defence of consent can only be raised where the activity in question constitutes good reason, is legal and the degree of harm inflicted does not involve actual bodily harm or more serious harm.[32]

2.13 Despite the precedent set by *R v Brown*, the defence has continued to be used in trials, even in cases where the victim has died. It has also been undermined by further legal decisions see for example, the case of *R v Slingsby* (1995),[33] which was also referenced in *R v Broadhurst* (2018).[34] The decision of *R v Brown* only deals with the question of consensual violence in sadomasochism and it is this lens through which violent assault and killings has been viewed. This has led to perpetrators serving lesser sentences. For example, in the case of Janet O'Donaghue who was strangled and killed by her partner in 1997. The perpetrator claimed she died accidentally in what was deemed as deviant sexual behaviour, it was accepted that he did not intend to cause her death and he was subsequently charged with manslaughter with a five year sentence.[35]

2.14 The NIHRC recommends that the Department of Justice introduces legislation that removes the defence of consent to serious harm for sexual gratification. It is suggested that consideration is given to the wording used in the England and Wales Domestic Abuse Bill.

3.0 Gender-based Violence

3.1 The use of the defence disproportionally affects women and girls. It is recorded that 60 of those 67 killed in the UK and three killed in Northern Ireland where the defence has been used were women and girls and all suspects in these killings were male.[36] The current law fails to recognise the gendered dimension of the violence associated with the defence.

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[32] *R v Brown* (1993) UKHL 19.
[33] *R v Slingsby* (1995) Crim LR 570.
[34] *R v Broadhurst* (2018) EWCA Crim 2026.
[35] We Can't Consent to This, 'Northern Ireland Consultation on Changing the Law on 'Rough Sex' Defences' (We Can't Consent to This, 2020).
[36] We Can't Consent To This, 'Women and Girls from Northern Ireland'. Available at: https://wecantconsenttothis.uk/northern-ireland

3.2 The UN Committee on the Elimination of Discrimination against Women (UN CEDAW Committee) and the UN Committee against Torture (UN CAT Committee) have highlighted gender-based violence as a persistent issue in the UK, including Northern Ireland.[37] Both UN Committees have also highlighted the disproportionate impact on women and the need for gender sensitive policies to provide protection, prosecution and redress.[38]

3.3 Article 1 of the UN CEDAW ensures that gender-based violence against women constitutes discrimination against women and therefore engages all obligations under the Convention.[39] Article 2 UN CEDAW provides that the overarching obligation of States parties is to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women.[40]

3.4 Under the UN CEDAW, the Northern Ireland Executive is responsible for acts or omissions of its organs and agents that constitute gender based violence against women, which include the acts or omissions of officials in its executive, legislative and judicial branches.[41] Article 2(d) of the UN CEDAW provides that the Northern Ireland Executive, and its organs and agents, are to refrain from engaging in any act or practice of direct or indirect discrimination against women and ensure that public authorities and institutions act in conformity with that obligation.[42]

3.5 The UN CEDAW Committee, in its 2019 Concluding Observations on the UK, noted "with particular concern the inadequacy of laws and policies to protect women in Northern Ireland (from gender-based violence)".[43] The UN CEDAW Committee also made specific reference to the need to ensure that the UK's "laws and policies effectively protect women with disabilities

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[37] CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 56; CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 29.
[38] CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 56; CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 29.
[39] Article 1, UN CEDAW. Ratified by the UK 1986.
[40] Article 2, UN CEDAW. Ratified by the UK 1986.
[41] CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender-based Violence against Women', 26 July 2017.
[42] Article 2(d), UN CEDAW. Ratified by the UK 1986.
[43] CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019, at para 29.

from all forms of gender-based violence, and in particular violence perpetrated by their caregivers".[44]

3.6 Gender-based violence against women may amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including in cases of rape, domestic violence or harmful practices. Article 1 of the UN CAT defines the term "torture" as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.[45] Article 2 of the UN CAT provides that the State should "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".[46]

3.7 The UN CAT Committee, in its 2019 Concluding Observations on the UK, raised concerns of sexual and gender-based violence and stated concerns about reports that within the UK, including Northern Ireland, there are increasing numbers of domestic abuse crimes and sexual offences, mainly against women, being recorded and yet the prosecution and conviction rates in these cases remain low.[47]

3.8 The UN CEDAW Committee, in its 2019 Concluding Observations, recommended the UK ratify the Istanbul Convention.[48] The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) provides a legal framework at pan-European level to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence. The UK Government has made it clear that it intends to ratify the Istanbul Convention and is currently in the process of addressing existing areas of non-compliance, such as extending its protections regardless of immigration status, criminalisation of psychological control across the UK, ensuring extraterritorial application, and protecting those that are reliant on spousal/partner support for residence status.[49]

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[44] CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019, at para 29(b).
[45] Article 1, UN CAT.
[46] Article 2, UN CAT.
[47] CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019 at para 56.
[48] CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 29.
[49] Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017; Home Office, 'Ratification of the CoE Convention on Combating Violence against Women and Girls and Domestic Violence (Istanbul Convention) – 2020 Report on Progress' (HO, 2020), at Annex A.

3.9 The Istanbul Convention is specific to protecting women and girls from violence. It can also be used as an indicator of best practice more broadly in providing guidance on how to develop legislation to outlaw consent to serious harm for sexual gratification as a defence and in relation to developing appropriate prosecution measures in relation to gender based violence.

3.10 Article 18 of the Istanbul Convention provides that the State should take the necessary legislative measures to ensure that there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies in protecting and supporting victims and witnesses of all forms of violence. It also ensures this is based on a gendered understanding of violence against women and focuses on the human rights and safety of the victim.

3.11 Article 29 of the Istanbul Convention provides that the State shall take the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrator.

3.12 Articles 35 and 36 of the Istanbul Convention ensure protection against physical violence and sexual violence including rape. It provides that the state shall take the necessary legislative or other measures to ensure that the intentional conduct of committing acts of physical violence against another person is criminalised. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.

3.13 Article 43 of the Istanbul Convention provides that offences established in accordance with the Convention shall apply regardless of the nature of the relationship between victim and perpetrator. This is an important Article as in many of the reported cases where the defence has been used the perpetrator and victim have been in a relationship and the sexual behaviour has been deemed as part of their normal sexual relationship which has been used in support of the defence.

3.14 Article 45 of the Istanbul Convention ensures that the offences are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness.

3.15 Article 48 of the Istanbul Convention provides for the prohibition of mandatory alternative dispute resolution processes or sentencing. Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention.

3.16 Article 49 of the Istanbul Convention provides that the State should take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention.

3.17 The NIHRC recommends that the proposed legislation should include an element that protects against gender-based violence, using the UN CEDAW, UN CAT and Istanbul Convention as a guide.

4.0 A Parallel Programme of Education

4.1 The NIHRC supports the Department of Justice's inclusion of awareness raising of the dangers of rough sex, and the meaning of consent, as well as the inclusion of raising awareness within the criminal justice system to recognise and deal appropriately with the issue when a victim makes a complaint.

4.2 The UN CAT Committee, in its 2019 Concluding Observations, made specific reference to the need for training on domestic violence and gender based violence. It recommended that the UK Government should "provide mandatory training on the prosecution of gender-based violence to all justice officials and law enforcement personnel and continue awareness-raising campaigns on all forms of violence against women".[50]

4.3 The UN CEDAW Committee within its General Recommendation No 35 on gender-based violence against women, regarding preventative measures, recommended that States should "provide mandatory, recurrent and

[50] CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019 at para 56.

effective capacity-building, education and training for members of the judiciary, lawyers and law enforcement officers".[51]

4.4 The Gillen Review Report also made recommendations concerning training and education. Recommendation 4 of the Gillen Review Report states that "measures should be introduced at the outset of the trial to combat rape myths for example, jury educational material, a short video and written judicial directions. In the wider context, there is a need for an extensive public awareness and school education campaign".[52]

4.5 Education on healthy relationships and prevention of gender-based violence requires a cross-departmental approach. The UN CEDAW Committee has made several recommendations on mandatory, standardised reproductive and sexual education in NI. In its 2019 concluding observations ,the UN CEDAW Committee recommended the UK Government and NI Executive to:

> take measures to introduce into school curricula mandatory, age - appropriate education on sexual and reproductive rights, including issues such as gender relations and responsible sexual behaviour, throughout the State party.[53]

4.6 Within the UN CEDAW Committee's Inquiry Report into abortion in NI it recommended that the NI Executive urgently:

> make age-appropriate, comprehensive and scientifically accurate education on sexual and reproductive health and rights a compulsory component of curriculum for adolescents, covering prevention of early pregnancy and access to abortion, and monitor its implementation.[54]

4.7 The NI (Executive Formation etc) Act 2019 committed the UK Government implementing the UN CEDAW Committee's inquiry report recommendations on reproductive healthcare education in NI. However, the NIHRC

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[51] CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender-based Violence against Women', 26 July 2017 at para 30(e).
[52] John Gillen, 'Gillen Review Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland Recommendations' (DoJ, 2019).
[53] CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 42(c).
[54] CEDAW/C/OP.8/GBR/1, 'UN CEDAW Committee Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the UN CEDAW Report of the Committee', 6 March 2018, at para 86(d).

understands that no specific action has been taken to implement this recommendation.

4.8 The NIHRC recommends that the Department of Justice works with the Department of Education to provide a parallel programme for education alongside the legislation. The NIHRC recommends that the programme for education specifically references human rights standards and considers recommendations of the UN CEDAW Committee and Gillen Review.

4.9 The NIHRC continues to call on the UK Government and NI Executive to fulfil their obligations outlined in the NI (Executive Formation etc) Act 2019. The NIHRC continues to recommend the introduction age appropriate and scientifically based reproductive and sexual health education that addresses the meaning of consent, healthy relationships and prevention of gender based violence. This will require cross departmental collaboration.

5.0 Additional Considerations

Non-fatal strangulation

5.1 The offence of choking, suffocation or strangulation is legislated for in the Offences against the Person Act 1861. It can only be tried in the Crown Court and carries a maximum penalty of a life sentence. A component part of the offence is that the offender also intended to commit a further indictable offence. The impact of this is that most strangulation cases are progressed under alternative charges. Therefore, non-fatal strangulation is commonly charged as Common Assault, where consent for sexual gratification can be used as a defence. The NIHRC is aware that the Department of Justice is currently reviewing the law on non-fatal strangulation.

5.2 Strangulation is a feature of most of the homicides and non-fatal assaults that have involved the use of the rough sex defence by the perpetrator.[55] This has been the case in several incidents in Northern Ireland, for

[55] We Can't Consent to This, 'Northern Ireland Consultation on Changing the Law on 'Rough Sex' Defences' (We Can't Consent to This, 2020).

example, by a Lisburn man in 2019 and three men in County Antrim in 2020.[56]

5.3 Given the Department of Justice is reviewing the law on non-fatal strangulation, any proposal for legislation on consent to sexual gratification must ensure that perpetrators of non-fatal strangulation assaults cannot use consent as a defence.

5.4 The NIHRC recommends the Department of Justice brings forward appropriate legislative change as soon as is practicable for non-fatal strangulation to be regarded as a standalone offence. Any legislative change should be clear that the defence of consent to harm for sexual gratification can no longer be used.

Gillen Review

5.5 The NIHRC continues to support the recommendations made in the Gillen Review into the law and procedures in serious sexual offences in Northern Ireland. Relevant recommendations in relation to this consultation include Recommendation 6, which requires "a more robust judicial attitude and case management approach to prevent improper cross-examination about previous sexual history".[57] Also Recommendation 9, which requires "amendments to the Sexual Offences (Northern Ireland) Order 2008 to ensure juries do not bring sexual stereotypes into play and to impose a discernible shift towards a measure of affirmative expression of consent".[58]

5.6 The NIHRC recommends that the Department of Justice takes effective steps to promptly implement the recommendations of the Gillen Review in Northern Ireland. In particular, recommendations 6 and 9, which would assist in dispelling the rough sex defence narrative used by perpetrators.

Data Collection

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[56] We Can't Consent to This, 'Northern Ireland Consultation on Changing the Law on 'Rough Sex' Defences' (We Can't Consent to This, 2020).
[57] John Gillen, 'Gillen Review Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland Recommendations' (DoJ, 2019).
[58] John Gillen, 'Gillen Review Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland Recommendations' (DoJ, 2019).

5.7 Currently, the We Can't Consent to This campaign is the only organisation collecting data on the use of the rough sex defence claim. Reflecting Recommendation 11 of the Gilllen Review, disaggregated data collection and wider research to aid monitoring of the use of the rough sex defence specifically in Northern Ireland is required. This recommendation requires "the Department of Justice should commission individual research projects to gather knowledge and data in Northern Ireland on the prevalence, extent, nature and experiences of serious sexual offences".[59]

5.8 The NIHRC recommends the Department of Justice gathers disaggregated, comprehensive data on the use of the rough sex defence in Northern Ireland and that this data is published in accessible formats and effectively monitored. This data should be used to identify areas where further research is required and be used to establish the effectiveness of the law and whether further measures, training or guidelines are required.

[59] John Gillen, 'Gillen Review Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland Recommendations' (DoJ, 2019).

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