Consultation on the rough sex defence NI

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Q1. Is the law sufficient as it stands?

No.

1. While the current law is on consent to harm is uncertain, complex and misunderstood (David Ormerod and Karl Laird, Smith, Hogan and Ormerod's Criminal Law, 15th ed. OUP 2015; Alison Cronin, Jamie Fletcher and Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence), focus on the defence of consent obscures the fact that strangulation gives rise to distinctive issues to which the existing non-fatal and, consequently, fatal offences are ill-suited.

1.2 The uncertainty of the current law of consent

1.2.1 While consent to a common assault or battery is a valid defence, consent to actual bodily or more serious harm is not a valid defence unless the activity involved is recognized as being in the public interest. The validity of consent is determined by reference to:

a) the level of harm inflicted in fact,
b) the level of harm foreseen or intended by the parties and
c) the nature of the activity in which it is inflicted.

All three elements are problematic.

1.2.2 Consent and the level of harm inflicted.

Unless the activity falls within one of the excepted categories (see below at 1.2.4.1 – 1.2.4.4), the legal threshold at which consent is not a valid defence to injury is actual bodily harm. This has been defined as "any hurt or injury calculated to interfere with the health or comfort of the victim" (R v Miller [1954] 2 QB 282) and can be any harm that is more than "merely transient and trifling" (T v DPP [2003] Criminal Law Review 622).

1.2.2.1 From the liberal perspective, this has been criticized as being far too low a threshold at which to deny personal autonomy and a higher threshold of "serious disabling injury" has been recommended (Law Commission, Consultation Paper no 139 on Consent in the Criminal Law, HMSO 1995, Part II, para 2.3-2.4; Julia Tolmie, 'Consent to Harmful Assaults: The Case for Moving Away From Category Based Decision Making' [2012] Criminal Law Review 656). This would accord with the higher threshold adopted in many other jurisdictions (Law Commission, Consultation Paper no 139 on Consent in the Criminal Law, HMSO 1995, Appendix B).

1.2.2.2 In the context of strangulation*, in 50% of reported cases there are no visible injuries but this masks the fact that there are likely to be internal injuries sustained (see 4.2.2 below).

** "strangulation" includes strangulation, choking, suffocation, asphyxiation and all other forms of oxygen restricting practices, although the terms have distinct definitions they are used interchangeably throughout the response*

1.2.3 Consent and the level of harm foreseen or intended.

1.2.3.1 Intention to cause actual bodily harm

Where the accused intends to cause and does in fact cause actual bodily harm, or worse, the victim's consent to the harm is invalid unless the harm occurs in the course of an excepted activity (R v Donovan [1934] 2 KB 498; R v Brown [1994] AC 212; R v Dica [2004] EWCA Crim 1103) (see 1.2.4 below regarding excepted activities).

1.2.3.2 Recklessness as to causing actual bodily harm.

The law is not clear as to whether the victim's consent to a battery is invalid where the accused does not intend to cause actual bodily harm, or worse, but he does in fact cause such harm. Three different approaches have been taken:

a) In the Attorney-General's Reference (No. 6 of 1980) [1981] 1 WLR the court held that consent was not valid in such a case.

b) In R v Boyea (1992) 156 JP 505 it was held that consent would be valid if the actual bodily harm was not objectively foreseeable.

c) In R v Slingsby [1995] Crim LR 570 and R v Emmett [1999] EWCA Crim 1710 the court held that consent would be valid if the actual harm caused was not foreseen by the defendant himself/herself.

1.2.3.3 While recklessness is a subjective matter in the context of the offences against the person, and the approach taken in, for example, Slingsby [1995] Crim LR 570 in relation to consent at c) above, some cases have based liability on objective recklessness. In R v Boyea (1992) 156 JP 505, for example, at b) above, it was held that the defendant's twisting of his hand in the victim's vagina was "likely" to cause harm that was not "transient or trifling" and he was convicted of (indecent) assault albeit he neither foresaw the harm nor intended it. Although the Court of Appeal has apparently accepted the approach taken in c) (R v Meachen [2006] EWCA Crim 2414), an authoritative ruling is needed to provide the clarity (Jonathan Herring, Criminal Law Text, Cases and Materials, 8th ed. Oxford University Press 2018, p. 365).

1.2.3.4 If Meachen [2006] is the correct approach, where the defendant intends to make physical contact with a person, with that person's consent, and intends to cause harm consistent with a battery, he/she will not be guilty of an offence of causing actual bodily harm, or worse, if that level of injury is in fact inflicted but it was not foreseen by the defendant. It should be noted that since this is a general principle of law, with application to all activities, there is no need to consider whether the conduct falls within an excepted category (see below at 1.2.4) in such a case. In view of its consequences in the law of manslaughter (see 1.3.5.2 below), it appears to be this legal principle that has caused public outcry, with the perception that killers are evading justice.

1.2.3.5 The law on consent to harm is further complicated by the fact that consent to the force is one issue and consent to the harm that results is another, the two issues typically arise together but are subject to different legal principles. The prosecution must prove intention or recklessness as to the infliction of unlawful personal violence (R v Rolfe (1952) 36 Cr App R 4) to make out an assault and, having done so, there is no need to prove intention or recklessness as to the harm actually caused (Savage & Parmenter [1991] UKHL 15; Veronica Cowan, 'Indecent assault – defence of consent – whether injury more than "transient or trifling" – take account of current day social attitudes to sexual activity among consenting adults' (1992) Criminal Law Review 574-576). However, where the issue of consent is raised as a defence, intention or foresight of the actual harm is relevant. The confusion is such that the court in R v Boyea (1992) 156 JP 505 overlooked the fact that there was arguably no battery committed and therefore no basis upon which a conviction for assault occasioning actual bodily harm could be founded.

1.2.3.6 Applying the current law, the following propositions can be made:

a) Liability for battery requires the unlawful infliction of force, it is unlawful if there is no consent.

b) Liability for actual bodily harm requires liability for a battery + actual bodily harm caused, even if the harm was not foreseen.

c) If the victim consents to the infliction of force there is no battery, unless actual bodily harm is caused and the defendant foresaw the risk of it (if R v Meachen [2006] is correct) and the harm occurred in the course of activity that is not an excepted category. In such a case the defendant may be convicted of assault occasioning actual bodily harm (Offences Against the Person Act 1861, s. 47).

d) If the victim consents to the infliction of force and actual bodily harm is caused, the defendant will not be guilty of battery (and therefore not guilty of actual bodily harm) if he/she did not foresee the risk of the harm, whether or not the activity is in an excepted category.

e) It follows from d) that if the victim consents to the infliction of force and death is the

result, the defendant will not be guilty of unlawful and dangerous act manslaughter if he/she did not foresee the risk of some harm, whether or not the activity is in an excepted category. The fact that the conduct was dangerous, i.e poses the risk of some physical injury, objectively viewed (R v Carey [2006] Crim LR 842), is of no relevance since there was no unlawful act.

1.2.3.7 As the law currently stands, assuming R v Meachen [2006] is correct, it is not necessary to prove foresight of harm for a conviction for the offence of occasioning actual bodily harm (R v Savage; R v Parmenter [1992] 1 AC 699) but it is necessary for the prosecution to prove foresight of harm if the defendant is asserting that the infliction of force was consensual. The law on consent is both uncertain in relation to whether recklessness (foresight) of harm is to be viewed objectively or subjectively and it is overly complex. It is not surprising that the public do not understand the role and scope of consent to harm as a defence.

1.2.3.8 There is additional uncertainty surrounding potential inconsistencies between the defendant's state of mind and that of the "victim". While the concept of "consent" to harm seems to imply a commonly shared intention as to the causing of actual bodily harm or a common foresight as to the risk of it, this may not be the case. Seemingly unconsidered, and unresolved, are cases in which there is no shared expectation. For example, where actual bodily harm is caused by the conduct (not being in one of the excepted categories) and the "victim" gave consent intending or foreseeing the risk of actual bodily harm whereas the defendant neither intended nor foresaw the risk. The question arises as to whether the other general principles of law should be involved, such as encouraging and assisting contrary to sections 44, 45 or 46 Serious Crime Act 2007 or the doctrine of innocent agent, so as to convict the "victim" if not the defendant. Such a question would turn on the application of the so-called Tyrrell principle, the scope of which is itself uncertain (Michael Bohlander, 'The Sexual Offences Act 2003 and the Tyrrell principle – criminalizing the victims?' (2005) Sep. Crim LR 701 – 713).

1.2.3.9 While the issue of consent in relation to the sex offences is determined by reference to the defendant's reasonable (objective) belief that the victim is consenting (see for example Sexual Offences Act 2003, s. 1), consent in relation to harm is premised on a different basis, namely the defendant's honest (subjective) belief.

1.2.4 Consent and the type of activity in which the harm is inflicted - excepted categories.

1.2.4.1 As a matter of public policy there are excepted categories of activities in which consent to actual bodily or serious harm is legally valid. However, these categories are also uncertain, they lack clear definition and are the subject of an arbitrary assessment by the court on the issue of the activity's public utility.

1.2.4.2 Excepted activities include properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, horseplay and body modification. In the context of sado-masochism, the paternalist view prevails such that consent is not valid to intended or foreseen

actual bodily harm, or worse, caused by sado-masochistic activity.

1.2.4.3 However, the courts reason by analogy to determine whether the conduct in question falls within an excepted category. For example, where a defendant branded his wife's buttocks at her request, the court held that her consent to the burn injury was valid, reasoning by analogy with the tattooing/personal adornment excepted category of activity (R v Wilson [1997] QB 47 CA). In contrast, where burn injuries were sustained for the purpose of sexual arousal the activity was not considered analogous to tattooing and the victim's consent was not a valid defence (R v Emmett [1999] EWCA Crim 1710 CA). Reasoning by analogy leads to arbitrary decisions such that an activity could be both included and excluded from an excepted category at the same time (Julia Tolmie, 'Consent to Harmful Assaults: The Case for Moving Away From Category Based Decision Making' [2012] Criminal Law Review 656) providing a defence in one case but not in the other. It is not clear what decision the court would have reached in R v Wilson [1997] if, for example, the "branding" had also involved an element of sexual arousal of one or both participants.

1.2.4.4 In as much as the Lords of Appeal in Ordinary in R v Brown [1994] 1 AC 212 were divided as to the nature and categorisation of sado-masochism, whether it should be considered a violent or a private sexual matter, the current law also fails draw a clear line between rough sexual behaviour that is part of the ordinary expression of sexuality, for example nibbling and biting, for which consent is valid, and activities that are to be categorized as sado-masochistic and for which it is not (LH Leigh, 'Sado-Masochism, Consent and the Reform of the Criminal Law' [1976] 39 Modern Law Review 130).

1.2.5 Further confusion to the current law on the defence of consent to harm in the course of sexual activity is subjected to further confusion with the emerging line of authority that a person can give valid informed consent to the risk of contracting a potentially fatal disease such as HIV (R v Dica [2004] EWCA 1103; R v Konzani [2005] 2 Cr App R 14).

1.3 The current law of fatal offences, "rough sex" cases and the role of consent.

1.3.1 Although the substance of the law is sufficient to deal with rough sex killings, the current legal architecture of the fatal offences, murder and manslaughter, and the application of the law in cases where deaths result from "rough sex", is misunderstood by the public (Alison Cronin, Jamie Fletcher and Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence).

1.3.2 The misunderstanding extends also to the role of consent where fatalities occur and there is a popular misperception that consent is being used as a defence to murder, when it is not. (Alison Cronin, Jamie Fletcher and Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-

to-offence; Hannah Bows and Jonathan Herring, 'Getting Away With Murder? A Review of the "Rough Sex Defence" (2020) 84(6) Journal of Criminal Law 525-538).

1.3.3 The current law of murder

1.3.3.1 To be guilty of murder, it must be proved that the defendant performed the act that resulted in the victim's death and, crucially, that the defendant either intended to cause death or grievous bodily harm, R v Cunningham [1982] AC 566 (HL). There are three points to make in relation to the culpable state of mind for murder. Firstly, intention usually means that the outcome is the aim, purpose or desire of the actor but the law also accepts that intention may be found where the actor foresees the particular outcome as a virtually certain consequence of his act, even if he does not desire it, and carries on with his activity regardless, R v Woollin [1999] 1 AC 82 (HL). Secondly, the law is already controversial in that it creates "constructive" liability where the defendant did not intend to kill (or foresee death as a virtual certainty) but he/she can be convicted for murder if he intended to cause really serious injury (or foresaw it as a virtual certainty), even if that injury is not usually life-threatening, DPP v Smith [1961] AC 290 (HL), R v Bollom [2003] EWCA Crim 2846. Thirdly, culpability is a subjective issue and a defendant cannot be found guilty because a reasonable person would have thought that death or really serious harm was virtually certain (Alison Cronin, Jamie Fletcher and Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence).

1.3.3.2 In the context of rough sex resulting in death, a number of factual circumstances might exist. A defendant may, for example, harbour a desire to kill his/her partner and go on to commit the intentionally fatal act during sexual activity. A defendant might also engage in a sexual activity that he/she realizes is virtually certain to cause a really serious injury to the partner although there is no intention to kill. In both cases, the resulting death of the partner would attract liability for murder such that the label "murderer", and the mandatory life sentence this requires, can be imposed on both the archetypal serial killer and the "unlucky" individual who envisaged really serious but not fatal harm in the course of sexual conduct. The fact that the victim consented to rough sex, with a foreseen risk of either a lower or higher level of injury, has no bearing whatsoever on the culpability of the defendant and it is not a defence. Thus, when a defendant claims that the fatal activity was consensual he/she is not raising some special "rough sex defence", which does not exist, he is providing a context for his assertion that he lacked the mental state required for a murder conviction. It is a matter for the jury, in view of all the evidence, to decide whether they believe the defendant and it is, of course, for the prosecution to prove its case beyond reasonable doubt (Alison Cronin, Jamie Fletcher and Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence).

1.3.3.3 Campaigners for reform are not targeting either of the scenarios above (at 1.3.3.2) from which a murder conviction could flow.

1.3.3.4 While public campaigns have struggled to articulate their objections to the current law in legal terminology, the real bone of contention appears to lie in the widespread misperception that people who are guilty of murder are "getting off" because they are claiming that the victim consented to rough sex (https://wecantconsenttothis.uk/).

1.3.3.5 It follows that the substance of the public campaign, albeit mischaracterized as the need for a change in the defence of consent, is essentially to expand the law of murder (Alison Cronin, Jamie Fletcher and Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence).

1.3.3.6 Because the law is not clear, members of the public do not understand that evidence of the victim's consent or previous consent to "rough sex" is properly raised at trial in some circumstances. For example, in a trial for murder it may be relevant to the defendant's assertion that he/she lacked the mental state required for a murder conviction, namely that he/she did not intend to kill or to cause grievous/ really serious harm. In a trial for unlawful and dangerous act manslaughter it will be relevant if the defendant asserts that he/she did not commit the base offence of battery. In such a case the consent of the victim would be a denial of one of the elements of the actus reus of the offence, namely that the infliction of force was not unlawful.

1.3.4 Objections to expanding liability for murder for rough sex fatalities

1.3.4.1 To expand liability for murder such that culpability is not based on the mental blameworthiness of the defendant but on the nature of the activity during which death occurs expresses a moral judgment about that activity. Morality is a slippery concept and there has been a vigorous debate through the decades that the enforcement of morality alone is not a proper aim of the criminal law. In the context of sexual behaviour this expands to a consideration of the distinction between spheres of conduct that should be classified as private, and should not be subject to intervention, and conduct that is primarily violent and that therefore justifies the involvement of the criminal law on, for example, paternalistic grounds. The decision in R v Brown [1994] 1 AC 212, on consent to harm, saw the paternalistic view prevail in the face of cogent counter arguments based on individual autonomy and the libertarian perspective. To impose liability for murder on the basis of the character of the behavioural context of the death would, by analogy, open the door to an unprincipled imposition of liability for murder for any other conduct that results in a loss of life (Alison Cronin, Jamie Fletcher and Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence).

1.3.4.2 Expansion of murder liability to encompass any death occurring during rough sex would violate arguably the most basic right of the individual, the autonomy to decide how to lead one's life. The lifestyle autonomy principle has come to the fore in the twentieth century with political priority given to the need to address public negatives, for example affecting women, as an important

social and ethical development. Parliament must therefore tread a fine line balancing respect for autonomy and reducing the harm that will be incurred in consequence. With such important principles at stake, any change to the law of murder demands a thorough debate and a principled approach (Alison Cronin, Jamie Fletcher and Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence).

1.3.4.3 To convict for murder without proof of the requisite intent would drive a coach and horses through the principle of fair-labelling in the ‘‘sex gone wrong” cases and principles of proportionality and fairness in sentencing. It would serve to reduce the perceived gravity of the murder offence where the label is well-deserved. Furthermore, campaigners who go as far to suggest that defendants should be prosecuted for murder even if death is the ‘‘bad luck” result of a genuine accident are advocating in effect the imposition of a ‘‘no fault” murder offence. This would reduce it to the level of, for example, a minor traffic violation – but would nonetheless attract a life sentence for the ‘‘unlucky” (Alison Cronin, Jamie Fletcher and Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence).

1.3.4.4 Although not plainly articulated, campaigners are clearly aggrieved by defendants adducing evidence at trial of the surrounding sexual context of the death. However, there is a fundamental right to a fair trial which must include the right to give evidence that is relevant, including that as to the defendant's mental state if the defendant is refuting the mens rea of the crime alleged. The defendant's right to a fair trial, including the right to adduce relevant evidence, needs to be balanced against concerns that the defendant is adducing evidence of the victim's sexual history as a means of "euphemising" or neutralizing his/her behaviour (Susan SM Edwards, 'Consent and the "Rough Sex" Defence in Rape, Murder, Manslaughter and Gross Negligence' (2020) 84(4) Journal of Criminal Law 293-311) and to shift legal and moral blame to the victim (C McGlynn, 'Challenging the Law on Sexual History Evidence: A Response to Dent and Paul' (2018) 3 Criminal Law Review 216, 222). While it must be recognised that in trials for murder or manslaughter there are evidential problems because the victim cannot give evidence, it is a cause of ongoing criticism and considerable upset to the victim's family that defendants in such cases that defendants face few limitations to adducing evidence of the victim's sexual history.

1.3.5 The current law of manslaughter

1.3.5.1 The two heads of manslaughter applicable in cases of sexual strangulation are the common law offences of "unlawful and dangerous act manslaughter" and "gross negligence manslaughter".

1.3.5.2 Unlawful and dangerous act manslaughter

Although the issue of dangerousness is determined by reference to the foresight of risk of some harm, objectively viewed, such that a defendant can be convicted even if he did not foresee any risk

of harm (DPP v Newbury [1997] AC 500, R v Watson [1989] 2 All ER 865), the issue of consent is of real significance in relation to the base, "unlawful" act. Where the victim consents to battery and the defendant has not intended or foreseen that the consensual assault /battery would lead to greater harm, the base offence is not made out and there can be no conviction for manslaughter (R v Slingsby [1995] Crim LR 570). This seems to be the bone of contention for reform campaigners.

1.3.5.3 Consent as a defence to the base offence in unlawful and dangerous act manslaughter appears to be at the heart of current campaign to abolish the defence of consent in cases of sexual strangulation and is the point at which the law of homicide can be considered insufficient. The issue of consent to battery is clouded by the associated assertion that the defendant did not foresee a risk of actual bodily harm when the activity is, by its very nature, an inherently dangerous one.

1.3.5.4 The offence of assault/ battery typically constitutes the base offence in sexual strangulation manslaughter cases in the absence of a strangulation offence. The Offences Against the Person Act 1861, s.21 does contain an "attempting to choke" offence but it is not applicable in that it is confined to situations where there is an intention to commit or assist in the committing of an indictable offence.

1.3.5.5 A conviction for assault/ battery requires proof that the infliction of force was "unlawful" and consent to the force provides a defence in that it refutes the unlawfulness of the act. The use of assault/ battery as the base offence inevitably leads to a detailed focus on the issue of consent.

1.3.5.6 Gross negligence manslaughter

It is of note that gross negligence manslaughter does not require proof of an unlawful act. Since evidence of the victim's consent may be relevant where unlawful and dangerous act manslaughter is concerned, i.e. to refute the unlawfulness of the base offence of battery, the issue of consent is far less relevant in gross negligence manslaughter. There is a considerable overlap of conduct that might be considered unlawful and dangerous and, at the same time, grossly negligent and, in such a case, a preference for indicting for gross negligence manslaughter would have the following advantages:

a) liability under gross negligence manslaughter requires that there is a duty of care owed to the deceased. A duty of care would be readily established under the "neighbour principle" in fatal strangulation cases (see for example R v Bowler [2015] EWCA 558).

b) since there is no need to prove any unlawful act, the issue of consent, and therefore the need for lengthy enquiry into the victim's past sexual history, is not relevant.

c) liability can be established for both acts and omissions where there is a duty to act.

d) a duty of care is easily identified in the case of positive acts where the acts create a serious risk of death obvious to the ordinary prudent individual (R v Rose [2017]EWCA Crim 1168),

e) in the case of a failure to act it can be established where the defendant has voluntarily assumed a duty of care for the victim, or

f) in a case where the defendant has contributed to the creation of a state of affairs that he/ she knew, or ought reasonably to have known, had become life-threatening (R v Evans [2009] EWCA Crim 650). The duty arising in this case was to take reasonable steps to save the victim's life by calling for medical help. This includes cases where the defendant and victim are engaged in a dangerous joint activity that goes wrong (W. Wilson, Criminal Law Theory and Doctrine, 3rd ed. Harlow, Pearson, Longman 2008).

g) Liability is not based on the defendant's foresight of risk of death but involves an objective test: whether a reasonable and prudent person would have foreseen the risk of death at the time of the breach of the duty (R v Rose [2017] EWCA Crim 1168).

h) The breach of the duty is determined by consideration of whether the defendant's action fell below the standard expected of a reasonable person.

1.3.5.7 In the case of consensual sexual strangulation, the duty of care / duty to act will arise at the point that a reasonable and prudent person would have foreseen the risk of death. The duty is then to take reasonable steps to save the victim's life. This is problematic in that death can occur within 1 – 5 minutes of blood or air restriction (California District Attorneys Association guidance on Investigation and Prosecution of Strangulation Cases 2020 at https://www.familyjusticecenter.org/wp-content/uploads/2020/09/Strangulation_2020-Online-Version.pdf> accessed Jan 10, 2021 pp. 12, 23; J. Stephen Stapczynski, 'Emergency Medicine Reports' (2010) 31 Practical Journal for Emergency Physicians 17) and any such measure would likely be too late to save the victim's life.

1.3.6 The current law is ill-suited to the distinctive nature and issues arising in the context of strangulation. Strangulation and other oxygen restricting practices require particularized legislation to address the fact that strangulation can occur in circumstances of both violent and a sexual circumstances, it is an especially dangerous practice, it can involve more cruel intent than other offences against the person and it often leaves no visible injuries (see section 3 below).

1.3.7 The lack of clearly defined offences of non-fatal strangulation and killing by strangulation, either in the course of sexual conduct or not, undermines the expressive function of the criminal law and principles of legal certainty and fair-labelling (Joel Feinburg, 'The Expressive Function of Punishment' (1965) 49(3) The Monist 397-423; James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law (2008) 71(2) Modern Law Review 217-246).

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

No

2. The law of consent and its role as a "defence" to offences against the person is complex, uncertain and misunderstood and it should be clarified by legislation. In principle, there is no objection to placing the law on consent in a statutory provision, whether it is a codification of the common law emanating from cases such as R v Brown [1994] 1 AC 212 and R v Meachen [2006] EWCA Crim 2414 or a the adoption of a new statutory approach that clarifies the current uncertainty in the common law.

2.1 However, in the context of sexual strangulation and other oxygen restricting practices, the defence of consent is not the primary issue and reform needs to focus instead on the creation of strangulation offences. The enactment of bespoke offences would clarify the scope of consent or, as is recommended here (see section 4), obviate the need to raise consent as a defence at all.

2.2 The Domestic Abuse Bill in England and Wales, Clause 65, appears to put the common law position on a statutory basis. However, the common law's threshold for valid consent to personal harm, other than in the excepted categories, is at the level of "actual bodily harm" and not "serious harm". While the Domestic Abuse Bill in England and Wales expressly includes the occasioning of actual bodily harm, (Offences Against the Person Act 1861, s. 47) as a relevant offence, the provision itself refers to "Consent to serious harm for sexual gratification". This will perpetuate confusion in this area of law in that its title infers that consent is valid to a more serious level of harm in the context of sexual gratification than it is in the context of other offences of violence, which, according to the same provision, (3), it is not. The provision is therefore doubly confusing in that it seemingly conflates actual bodily harm (s. 47) with the offences of grievous/ really serious harm (Offences Against the Person Act 1861, ss. 20 and 18) whereas these are distinct offences. To legislate in the same terms as the Domestic Abuse Bill in England and Wales, ie "Consent to serious harm for sexual gratification" would replicate the issues identified and fail to provide the desired legal certainty.

2.3 The law on consent would still be complex and confusing if the meaning of consent to harm was codified in statute. There are still issues of ambiguity with the excepted categories and the difference between consent to harm and consent in other contexts. The law of consent needs reform.

2.4 Notwithstanding the desirability of a clear statement of law in relation to the role of consent in the offences against the person, the approach taken in the Domestic Abuse Bill in England and Wales is fundamentally flawed in its identification of the legal problem, namely consent. Placing the common law on a statutory footing will have no effect on the outcome of future trials and whether defendants are found guilty of murder or manslaughter, or are acquitted, because in most cases consent is not raised as a defence but as an assertion that the defendant lacked the mens rea for murder or for the base offence of assault/ battery in unlawful and dangerous act manslaughter. Reform needs to focus on the potential offence(s) committed (Alison Cronin, Jamie Fletcher and

Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence) and clarify the role of consent to harm in the context of rough sex as a subsidiary point.

2.5 The current approach in England and Wales, expressed in the Domestic Abuse Bill, fails to acknowledge that a) sexual relationships occur outside the statutory definition of "domestic" relationships and that b) joint consensual engagement in a dangerous activity does not necessarily amount to "domestic abuse". Whatever statutory provision is enacted regarding the role of consent to harm, generally or in the specific context of "rough sex", it should not be contained in legislation dealing exclusively with domestic abuse.

2.5.1 In 1995, the Law Commission of England and Wales considered the law of consent in the criminal law and received a "wealth of evidence on consultation from people of both sexes who indulged in sado-masochistic activities to enhance sexual pleasure". It revealed a rapidly growing number of participants in Britain, showing that many thousands of people privately engaged in sado-masochistic practices, providing detailed insight into what was recognised as an increasingly mainstream practice. Contrary to the perception that forms of rough sex are confined to relationships defined by domestic abuse, many respondents reported that participants typically swap the active and passive roles within a single encounter and that both roles provide sexual arousal (Law Commission, Consultation Paper no 139 on Consent in the Criminal Law, HMSO 1995, Part X, pp. 130-144).

2.5.2 Since 1995 sado-masochism, or "rough sex", has become increasingly normalized in the media. It is no longer confined to niche pornography (https://www.theguardian.com/commentisfree/2018/may/13/choking-women-me-too-breath-play >accessed Jan 7, 2021) and there is a proliferation of other publications with information on "choking" such as that found at the Healthline website (https://www.healthline.com/health/healthy-sex/erotic-asphyxiation >accessed Jan 1, 2021). It is discussed in popular women's and men's magazines, with headlines such as "Choking as a Sex Move – Is it for You?, It may sound hardcore, but a good amount of WH [Women's Health] readers admit to loving it" (https://www.womenshealthmag.com/sex-and-love/a19938109/choking-during-sex/ > accessed Jan 1, 2021). The NHS has also contributed with reported findings such as those from a 2013 Dutch study in a publication entitled "Fans of bondage and S&M report better mental health" (https://www.nhs.uk/news/mental-health/fans-of-bondage-and-sm-report-better-mental-health/ >accessed Dec 31. 2020).

2.5.3 To categorize "strangulation" as a form of domestic abuse per se is therefore open to objection on a number of grounds, not least libertarian, and it would also serve as an affront to a large section of the public who engage in various forms of rough sex.

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

2.6 Yes, if the law on consent to harm were to be codified ss 18, 20 and 47 Offences Against the

Person Act 1861 are result crimes that address all actual and grievous bodily harms and, premised on constructive liability as well as intended grievous injury, they are comprehensive.

2.6.1 Although there have been recommendations to raise the threshold of harm that cannot be validly consented to, for example the Law Commission's suggestion of "serious disabling injury" (Law Commission, Consultation Paper no 139 on Consent in the Criminal Law, HMSO 1995, Part II, para 2.3-2.4), the proposal is not without criticism for its incoherence with the current offences against the person (David C Ormerod and MJ Gunn, 'Second Law Commission consultation paper on consent: (2) consent – a second bash' [1996] Criminal Law Review 694.

2.6.2 However, if the threshold of valid consent to harm were raised to a higher level of really serious/ seriously disabling injury, the defendant may be convicted of murder if, in accordance with that consent, he caused an injury that resulted in an unintended or unforeseen death. To alter the offences to which consent would apply would require a wholesale review of the law of non-fatal and fatal offences against the person.

2.7 While the current level of harm that can be consented to, in the excepted activities, is set at an extremely low level, actual bodily harm, it neatly avoids many of the problematic issues associated with consent in other areas of law, for example those raised in the context of consent in the sex offences, such as the victim's capacity to consent, vulnerable victims, the effect of intoxication, mistake, duress etc.

2.8 Given that most incidents of non-fatal strangulation do not leave external visible injuries, the law should be expressly extended to include trauma injuries may not currently be recognised as "actual bodily harm".

2.9 Clarification of the law of consent and its scope does not obviate the need to enact bespoke strangulation offences, fatal and non-fatal for the other reasons outlined elsewhere in this response.

Q3 Do you consider that a programme of education is needed to:

- raise awareness of the dangers of rough sex, and the meaning of consent; and
- raise awareness within the criminal justice system to recognise and deal appropriately with the issue when a victim makes a complaint?

Yes.

3. Sexual practices involving choking, asphyxiation, strangulation and other oxygen restricting activities have been normalized in the media (https://www.theguardian.com/commentisfree/2018/may/13/choking-women-me-too-breath-play >accessed Jan 7, 2021) and this serves to diminish recognition that such practices pose a substantial risk to health and endanger life.

3.1 Normalization reduces the perception that strangulation is inherently dangerous. According to the Training Institute on Strangulation Prevention, most victims, as well as many professionals, are not aware that non-fatal strangulation can cause, inter alia, brain damage, pneumonitis, miscarriage, heart attacks and delayed death, days, weeks or months after the event (Dean A. Hawley, et al, 'A Review of 300 Attempted Strangulation Cases Part III: Injuries in Fatal Cases' (2001) 21 Journal of Emergency Medicine 3: pp. 317–322). However, in around half of the reported cases there is no noticeable bruising to the neck and few victims seek medical help (https://www.strangulationtraininginstitute.com/health-issues-result-from-strangulation/ >accessed Jan 10, 2021). The lack of external physical evidence means that cases of choking may be treated as minor incidents although continuous pressure and obstruction of blood or air flow can lead to unconsciousness within 5-10 seconds and death within 1-5 minutes (California District Attorneys Association guidance on Investigation and Prosecution of Strangulation Cases 2020 at https://www.familyjusticecenter.org/wp-content/uploads/2020/09/Strangulation_2020-Online-Version.pdf> accessed Jan 10, 2021 pp. 12, 23; J. Stephen Stapczynski, 'Emergency Medicine Reports' (2010) 31 Practical Journal for Emergency Physicians 17).

3.2 Normalization obscures the fact that strangulation is also used as a form of power/ control and domestic abuse by those, typically men, who intend to kill or cause fear of death or violence in order to assert coercive control in relationships of abuse (The California District Attorneys Association guidance on Investigation and Prosecution of Strangulation Cases 2020 at https://www.familyjusticecenter.org/wp-content/uploads/2020/09/Strangulation_2020-Online-Version.pdf > accessed Jan 8, 2021).

3.3 Normalization runs contrary to evidence that strangulation is one of the most accurate predictors for the subsequent homicide of domestic violence victims (California District Attorneys Association guidance on Investigation and Prosecution of Strangulation Cases 2020 at https://www.familyjusticecenter.org/wp-content/uploads/2020/09/Strangulation_2020-Online-Version.pdf > accessed Jan 10, 2021). Women who are subjected to strangulation by their partners are 750 – 1000% more likely to be killed in a subsequent assault (Nancy Glass et al, 'Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women (2008) 35(3) Journal of Emergency Medicine, 329-335, fn 5 at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2573025/ > accessed Jan 10, 2021).

3.4 The dangers associated with strangulation are such that a number of national organizations have already passed position papers and resolutions to raise awareness of the gravity of strangulation, including the *International Association of Chiefs of Police* ('Increasing the Awareness of Lethality of Intimate Partner Strangulation' (2014) at https://www.theiacp.org/resources/resolution/increasing-the-awareness-of-the-lethality-of-intimate-partner-strangulation > accessed Jan 10,2021), the *International Association of Forensic Nurses* ('The Evaluation and Treatment of Non-Fatal Strangulation in the Health Care Setting' (2016) at https://cdn.ymaws.com/www.forensicnurses.org/resource/resmgr/education/Strangulation_Position_Paper.pdf> accessed Jan 10, 2021) and the *Emergency Nurses Association* ('An Overview of Strangulation Injuries and Nursing Implications' (2016) at

http://evaw.threegate.com/Library/DocumentLibraryHandler.ashx?id=898> accessed Jan 10, 2021).

3.5 Raising awareness of the dangers of rough sex/ choking needs to be achieved in an informed way that does not discourage the education of safe practices. In the 1995 Consultation, the Law Commission received responses stating that efforts at educating safe practice were hampered by criminalization and that as a result of the increased public awareness of potential criminal sanction, the Law Commission found that there had been a steady number of deaths involving persons practising auto-erotic asphyxiation alone, without supervision (Law Commission, Consultation Paper no 139 on Consent in the Criminal Law, HMSO 1995, Part X).

3.6 A programme of education is needed to counter the normalization process by:

a) raising public awareness of the dangers of strangulation practices;

b) raising public awareness of the link between choking and domestic abuse, victims need to understand the gravity and potential lethality of strangulation.

c) raising awareness within the criminal justice system to recognise and deal appropriately with suspected strangulation when a victim makes a complaint, this requires specialization.

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

Yes

4. Even if enacted, the Domestic Abuse Bill in England and Wales will only enshrine the existing and confusing common law principles of consent, it will not prevent defendants from claiming that they do not satisfy the offence they have been charged with. If Northern Ireland wants a meaningful reform it needs to go beyond empty gestures and window dressing.

4.1 The law in this area needs to reflect the spectrum of different circumstances in which strangulation/ oxygen restricting practices are undertaken. While there is considerable research into the association between strangulation, domestic violence and murder there is also evidence that strangulation is coming to be considered mainstream in terms of sexual behaviour. Although little research has been undertaken in relation to strangulation in the latter context, there is an apparent link between its increased practice and the normalization of strangulation in pornography and the media. Anecdotal evidence suggests that this phenomenon has a significant bearing on the issue of consent with (predominantly) females reporting sexual encounters in which they were unexpectedly subjected to pressure to the neck/ throat area by their partner. For many this was an unwanted element of the encounter but one to which they yielded nonetheless, conscious of the derision often afforded to so-called “vanilla” sex and anxious to satisfy what that they thought was the current social expectation. There is also some anecdotal evidence that males engage in strangulation of their sexual partner for the same reason.

4.1.1 The problems resulting from the normalization of strangulation in sexual encounters are twofold: firstly, it serves to obscure and conceal strangulation performed as a manifestation of violence, and therefore shields exceptionally dangerous men (this is a gendered offence) and, secondly, it obscures the fact that any form of oxygen restriction is exceptionally dangerous, even when it occurs in the context of sexual pleasure-giving.

4.2 Evidence shows that early intervention is the key to meaningful reform in this area since victims of one episode of strangulation are at a significant risk of subsequent murder, see para 3.3 above. The criminal law needs to be invoked at the stage of non-fatal strangulations because a high number of men (it is a gendered crime) who strangle go on to kill.

4.2.1 Studies in the US show that strangulation is common in domestic abuse with 68 – 80% of women who seek professional services reporting that they have been strangled (Lee Wilbur et al, 'Survey Results of Women Who Have Been Strangled While in an Abusive Relationship' (2001) 21 Journal of Emergency Medicine 3: pp. 297–302; Erin Schubert, Hope Lives Here: Impact of the Family Peace Center (2018) Sojourner Family Peace Center at https://www.familyjusticecenter.org/resources/hope-lives-here-impact-of-the-family-peace-center/ >accessed 10 Jan 2021; Whitney Bryen, "Strangulation of Women Is Common, Chilling—and Often a Grim Harbinger" (May 29, 2019) Oklahoma Watch at https://oklahomawatch.org/2019/05/29/539132/ > accessed Jan 10, 2021).

4.2.2 Strangulation is a unique crime that has been described as the equivalent to waterboarding and torture (Susan B. Sorenson et al, 'A Systematic Review of the Epidemiology of Nonfatal Strangulation, a Human Rights and Health Concern' (Nov. 2014) 104 American Journal of Public Health 11: pp. 54–61 at https://ajph.aphapublications.org/doi/10.2105/AJPH.2014.302191 > accessed Jan 10, 2021).

4.2.3 In the domestic violence context strangulation is usually about control, rather than the infliction of pain or injury, whereby the defendant shows that he has life or death control over the victim (Adam J. Pritchard et al, 'Improving Identification of Strangulation Injuries in Domestic Violence: Pilot Data from a Researcher Practitioner Collaboration' (2016) 13 Feminist Criminology 2: pp. 160–181).

4.2.4 Deprived of oxygen, the body has a an automatic reaction and knows it is about to die (Susan B. Sorenson et al, 'A Systematic Review of the Epidemiology of Non-fatal Strangulation, a Human Rights and Health Concern' (Nov. 2014) 104 American Journal of Public Health 11: pp. 54–61 at https://ajph.aphapublications.org/doi/10.2105/AJPH.2014.302191 > accessed Jan 10, 2021). It is therefore far more cruel in intent and far more dangerous than other forms of assault, causing brain injuries, internal harm and terror/ psychological effects, but since there are usually no visible signs of violence it is a weapon of choice for abusers (see https://www.familyjusticecenter.org/wp-content/uploads/2020/09/Strangulation_2020-Online-Version.pdf p. 25> accessed Jan 9, 2021 and the range of authorities cited at fn 34).

4.2.5 The two largest US studies into non-fatal strangulation found that 50% of incidents reported to the police lack visible injuries (Gael B. Strack, et al., A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues (Oct. 2001) 21 Journal of Emergency Medicine 3: 303–309; Adam J. Pritchard, et al., Improving Identification of Strangulation Injuries in Domestic Violence: Pilot Data from a Researcher Practitioner Collaboration (2016) 13 Feminist Criminology 2: pp. 160–181). The lack of visible injuries masks the fact that there is often internal injury and serious psychological impact on the victim.

4.2.6 The current law deals with non-fatal strangulation in the offence contained in Offences Against the Person Act 1861, s.21 but it is not standalone offence and only criminalizes the conduct, described unsatisfactorily in inchoate terms as "attempting to choke", where it is perpetrated in order to commit or assist in the committing of an indictable offence. The current law lacks a non-fatal strangulation offence.

4.2.7 Responding to decades of research, the California District Attorneys Association guidance on Investigation and Prosecution of Strangulation Cases 2020 observes "[t]here is no doubt that passing a new, standalone strangulation law has the potential to shine a spotlight on this issue and send a strong message to perpetrators that the community takes domestic violence and strangulation very seriously" (https://www.familyjusticecenter.org/wp-content/uploads/2020/09/Strangulation_2020-Online-Version.pdf > accessed Jan 8, 2021 at p. 17).

4.3 A bespoke offence of non-fatal strangulation.

On 5th January 2021, the Domestic Abuse Bill for England and Wales was returned to the House of Lords for the second reading with the former Victim's Commissioner, Baroness Newlove, putting forward an amendment to make non-fatal strangulation a stand-alone offence. If enacted, this will provide an important means of early intervention that is necessary to prevent future homicides by strangulation and a bespoke approach to non-fatal strangulation is recommended here for Northern Ireland.

4.3.1 Reform along the lines of criminalizing per se non-fatal strangulation, as is suggested by some campaigners (https://wecantconsenttothis.uk/blog), is susceptible to the same objections outlined above in relation to evidence of the consequences of the unsupervised practice that will follow (see section 3 para 3.5) and on lifestyle autonomy grounds (see para 2.5.3). Again, such a reform would be to criminalize on the basis of moral judgment and could lead to the unprincipled extension of the criminal law to any other activity considered to be unreasonably dangerous.

4.3.2 It is recommended that two non-fatal strangulation offences are enacted for NI.

Given the starkly contrasting circumstances in which strangulation occurs, on the one hand in relationships of domestic abuse or other violent encounters and, on the other, in the context of intimate consensual sexual relations, it is submitted that the better way to distinguish the offending behaviour is with the enactment of two distinct offences.

The recommended offences are:

4.3.2.1 Offence 1: Non-fatal strangulation causing fear of personal injury

"Any person who strangles, chokes, asphyxiates, suffocates or by any means whatsoever restricts the oxygen flow of another person when he knows or ought to know that it will cause other person to fear personal injury, shall be guilty of an offence."

4.3.2.2 This offence is intended to create liability in all cases where the strangulation occurs in the context of abuse/violence and in cases where a victim is, for example, unexpectedly strangled during the course of otherwise consensual sexual relations or the defendant continues strangulation beyond what was consented to such that the victim was put in fear of injury. Bearing in mind the typical escalation of abusive behaviour, fear of injury is not confined to the immediate strangulation and may include fear of future personal injury.

4.3.2.3 Drafted in the same terms as the harassment offence of putting people in fear of violence, Protection From Harassment Act 1997, s. 4, and the coercive control offence, Serious Crime Act 2015, s76, the test that the defendant "knows or ought to know" is objective such that the defendant will be guilty "if a reasonable person in possession of the same information would think the course of conduct would cause the other to fear", s. 4(2) and s. 76(5) respectively. Such an approach accords with policy considerations.

4.3.2.4 Offence 2: Non-fatal strangulation causing actual bodily harm

"Any person who strangles, chokes, asphyxiates, suffocates or by any means whatsoever restricts the oxygen flow of another person, either manually or with any implement, and thereby causes actual bodily harm, with or without the other person's consent, shall be guilty of an offence."

4.3.2.5 This offence is intended to create liability in any circumstances, including consensual sado-masochistic activities, where strangulation causes actual bodily harm. It amends the current common law of consent to harm in the context of strangulation in that it extends criminal liability to cases where actual bodily harm is caused, even where the defendant did not foresee the risk of harm (i.e. he was not subjectively reckless). In addition, there is no subjective mens rea requirement for the offence itself. While this is unusual in the criminal law it is justifiable in that oxygen restriction activities are so dangerous that they pose not just a risk of some harm but an obvious and real risk to life. This construction is consistent with the imposition of constructive liability in the offences against the person and it expressly avoids the problems identified above in relation to the application and scope of the consent to harm defence.

4.3.2.6 It is of note that in cases of this nature, where the victim does have signs of reddening to the skin, minor bruising, swelling etc these injuries should be considered as actual bodily harm because they are indicators of a more serious internal injury. This approach accords with existing authority, see R v Langford [2017] EWCA Crim 498, which also took account of the degree of fear experienced

by the victim.

4.3.2.7 Although the offence is broadly drafted, it is of note that victims of domestic abuse are often reluctant complainants and witnesses. The same is likely to be true of the victim who has fully consented to the sado-masochistic activity that has caused the injury and has otherwise (albeit not valid in law) "consented" to the injury. This construction allows for legal intervention on policy grounds if typical strangulation injuries come to light in the course of other professional intervention, e.g. medical. The criminal law may then be invoked, where appropriate, regardless of any reluctance on the victim's part to make a complaint.

4.3.3 It is recommended that the non-fatal offences are indictable only.

This would reflect the especially serious and distinct nature of the crime, i.e. the gravity of the defendant's state of mind, the extent of fear typically suffered by victims, that the conduct is life-endangering even if there are no visible injuries sustained or they appear superficial.

4.3.4 It is recommended that the non-fatal offences are not contained in domestic abuse legislation.

The offences need to address all incidents of strangulation, whether perpetrated in the domestic abuse context or not and whether or not strangulation occurs during the course of sexual activity.

4.3.5 It is of note that "Clare's Law", (Domestic Violence Disclosure Scheme, Dec 2016) would give future partners the right to know about previous offences.

4.3.6 Obviation of the problematic issue of consent

The particularized "strangulation" offences, as drafted above, do not involve the element of "unlawfulness" of force that exists in the general law of assault and battery and other non-fatal offences. The suggested reform therefore obviates the need to focus on the problematic issues of consent and consent to harm and the enactment of a non-fatal offence on these terms will also resolves the same issue as it is encountered in the context of the base offence in unlawful and dangerous act manslaughter (see 4.6.2.5 and 4.6.2.6 below).

4.4 Murder - For the reasons outlined above, at 1.3.4.1 – 1.3.4.4, no reform of the current law of murder is recommended.

4.5 The non-fatal strangulation offences and implications for the law of manslaughter.

4.5.1 For various reasons, including the stigma of the "murder" label, fair-labelling and the mandatory life sentence, where death occurs in circumstances where the defendant's state of mind

is less heinous, and there is no intention to kill or to cause serious harm, liability is classified as manslaughter. Prosecutors may indict a defendant for manslaughter or a jury may return a verdict of manslaughter as an alternative to murder.

4.5.2 The law of manslaughter includes the common law offences of unlawful and dangerous act manslaughter and gross negligence manslaughter. Where death occurs during rough sexual activity, consensual or not, and an intention to kill or to cause grievous/ really serious harm cannot be proved (i.e. murder), liability may be established where appropriate under one of these heads.

4.5.3 In most cases of "rough sex gone wrong" the conduct is unlikely to amount to murder. Unlike murder, the sentence for manslaughter is not a mandatory life-sentence but discretionary and the sentence imposed on conviction will reflect the moral blameworthiness of the defendant.

4.5.4 However, the existing law of unlawful and dangerous act manslaughter requires firstly, proof that a base offence has been committed, with the actus reus and mens rea of that offence made out, and secondly, that the conduct causing the death was dangerous. The first element is problematic in the context of rough sex fatalities in that the base offence is typically a battery which involves proof that the infliction of force was unlawful. Since consent is a valid defence to a battery, the issue of consent to strangulation often becomes a live issue at trial. Although the law on consent and consent to harm is uncertain and complex, consent to a battery in circumstances where the actual harm thereby caused is not foreseen, provides a defence to manslaughter. It is likely that the law in this area underlies the concern that defendants who strangle their partners during sex are "getting away with murder". The enactment of non-fatal strangulation offences as recommended above (at 4.3.2.1 and 4.3.2.4) offers a solution to the weakness of the current law in that the construction of the offences are such that the consent of the victim is not relevant.

4.5.5 The non-fatal strangulation offences (as drafted above at 4.3.2.1 and 4.3.2.4) provide a base offence on which unlawful and dangerous act manslaughter can be established irrespective of the consent of the victim.

The enactment of the non-fatal offences is pivotal to achieving a satisfactory law of homicide in strangulation cases where the defendant lacks the mens rea for murder.

4.6. Reform by way of bespoke homicide offence for sexual strangulation fatalities

4.6.1 If the law is to express something of particular significance about death occurring as a result of sexual activity going wrong, where there is no intention to kill or to cause grievous bodily harm (i.e. murder), it would be more appropriate to enact a bespoke offence (Alison Cronin, Jamie Fletcher and Samuel Walker, 'Homicide and violence in sexual activity, moving from offence to defence' blog for Sexual Trauma and Recovery Service (STARS), Dorset, 22nd June 2020 at https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence).

4.6.2 An eponymous offence, such as "sexual strangulation manslaughter" would satisfy the

expressive function of the law and accord with principles of fair-labelling (Jeremy Horder 'Rethinking Non-Fatal Offences against the Person' (1994) 14 OJLS 335) without destroying the fabric of the criminal law and its conceptual underpinnings. This offence would siphon homicides not reaching the mental culpability for murder involving violent sexual behaviour.

4.6.2.1 It is recommended that a sexual strangulation manslaughter offence is enacted

4.6.2.2 The application of the existing common law of manslaughter with the additional element that the death occurs in a sexual context would provide parity with homicides committed in non-sexual circumstances. The sexual element would be a matter of fact. For certainty and fair-labelling purposes, the two heads of the offence suggested are:

a) sexual strangulation manslaughter by unlawful and dangerous act, and
b) sexual strangulation gross negligence manslaughter.

4.6.2.3 These heads of liability would involve the same legal principles involved in the common law unlawful and dangerous act manslaughter and gross negligent manslaughter and would not require a wholesale reform of the law of manslaughter for deaths that occurring in the context of sexual activity.

4.6.2.4 The advantages of this approach are that:

a) it obviates the need to develop new and uncertain legal principles that may spawn future case law or retrospective appeals.

b) it takes advantage of the fact that the existing common law definitions are sufficiently broad as to encompass dangerous or grossly negligent sexual conduct of any nature involving oxygen restriction.

c) as the general law of homicide develops, either in common law or statute, the sexual manslaughter offence would develop in step without the need for additional enactment/reform.

4.6.2.5 Head one: sexual strangulation manslaughter by unlawful and dangerous act

4.6.2.6 If enacted, the non-fatal strangulation offences as drafted above (at 4.3.2.1 and 4.3.2.4) will provide base offences on which unlawful act manslaughter can be established, where appropriate, under the existing principles of law and regardless of the consent of the victim. It is the base offence rather than the element of dangerousness that has proved problematic in practice, the element of dangerousness would remain.

4.6.2.7 Head two: sexual strangulation gross negligence manslaughter

4.6.2.8 This head of liability will not alter the existing law on gross negligence manslaughter but it will serve the fair-labelling and expressive functions of the law. It will apply in appropriate cases and will be serve as an addition to the law where it is an alleged failure to act that renders the defendant liable.

4.7 Summary of recommendations for Northern Ireland:

a) The enactment of an non-fatal offence of 'strangulation causing fear of personal injury' whereby,

"Any person who strangles, chokes, asphyxiates, suffocates or by any means whatsoever restricts the oxygen flow of another person when he knows or ought to know that it will cause other person to fear personal injury, shall be guilty of an offence."

b) The enactment of a non-fatal offence of 'strangulation causing actual bodily harm' whereby,

"Any person who strangles, chokes, asphyxiates, suffocates or by any means whatsoever restricts the oxygen flow of another person and thereby causes actual bodily harm, with or without the other person's consent, shall be guilty of an offence."

c) The enactment of a bespoke offence of 'sexual strangulation manslaughter by unlawful and dangerous act', (the efficacy of which lies in the enactment of the non-fatal offences as above).

d) The enactment of a bespoke offence of 'sexual strangulation gross negligence manslaughter'.

e) The offences should not to be contained in domestic abuse legislation.

f) The provision of education to raise awareness of the dangers of rough sex and the provision of specialist training within the criminal justice system in recognition of the distinctive nature of the offence, the exceptional dangerousness of the conduct (and often the offender) and the different nature of injuries it causes.

g) While it does not address the deficiencies in the current law specific to strangulation, clarification of the law of consent to harm in relation to non-strangulation offences would be a

useful addition to any programme of reform.

Q5 Please provide any other comments

5. As an emerging area of significant concern, it is important to note that it would benefit from further research and the increased specialization of professionals dealing with victims of strangulation. This has been recognized in other jurisdictions where considerable progress has already been made in relation to the law, the investigative process and prosecutorial guidelines. Of note, a wealth of information that might guide this and further reform in this area can be found in the California District Attorneys Association 'Investigation and Prosecution of Strangulation Cases' 2020.