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Reforming Sexual Consent in Northern Ireland: Reflections on 'Reasonable Belief'

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Executive Summary

In Northern Ireland (NI) establishing the presence or absence of consent is a key factor in determining whether a sexual offence has been committed. The application of the consent threshold becomes even more complicated when the guilt or innocence of a defendant depends on whether their belief in consent was reasonably held.

This paper is a response to a specific proposal in the 2019 Gillen Review into serious sexual offences in Northern Ireland: that the definition as to what constitutes a reasonable belief in consent should be amended so as the jury are now asked to take account of a failure by the defendant to take any steps to ascertain whether the complainant was consenting.

Drawing from a Socio-Legal Studies Association (SLSA) funded project undertaken by the author, which included semi-structured interviews with individuals working in the sexual violence sector in NI, this paper situates NI's approach to sexual consent within broader trends towards 'affirmative models of consent'.

The paper advances three concrete recommendations aimed at strengthening Gillen's proposal on reasonable belief:

1. Amend procedural law on sexual offences to create a judicial filter for dealing with questions on consent;
2. Devise jury instructions that acknowledge the actions of the defendant and their mindset in the context of intimidation or coercive conduct, and;
3. Devise jury instructions dealing with the defendant's failure to take steps and providing some clarity around what is meant by a 'step'.

This paper situates NI's approach to sexual consent within broader trends towards 'affirmative models of consent'.

Introduction

Consent is the key concept separating permissible from impermissible sexual contact in many contemporary legal systems. Despite this, consent remains a vague concept with ongoing debates around what consent is, how it is communicated, and its relationship with concepts such as coercion.

Differing perspectives on these important questions can lead to 'consent confusion' (Gruber 2015) rendering the application of the consent threshold within a criminal justice context difficult, and potentially damaging to those involved.

This paper sets out the findings from a Socio-Legal Studies Association (SLSA) funded project exploring community and professional workers perceptions of the adequacy and scope of the current legal formulation of consent in Northern Ireland (NI), as well as the relevant proposals made in the 2019 Gillen Review into the investigation and prosecution of serious sexual offences.

This paper is a response to the specific proposal in the Gillen Review that the definition as to what constitutes a reasonable belief in consent should be amended so as the jury are now asked to take account of all the circumstances, including a failure by the defendant to take any steps to ascertain whether the complainant was consenting.

It also examines the recent trend towards the adoption of affirmative consent standards in other jurisdictions. That is, communicative conceptions of consent that may require active signals of agreement before an encounter is considered consensual.

Drawing from the findings of the SLSA project, the paper concludes by setting out three concrete recommendations aimed at moving the law and procedures around sexual consent forward: one amendment to NI's procedural law on sexual offences and two amendments/additions to jury instructions on sexual offences.

Method

The suggestions put forward in this paper arise out of a SLSA funded project which represents the first study to explore community and professional workers' perceptions of the adequacy and scope of the current legal formulation of consent in NI, as well as the relevant proposals made

in the 2019 Gillen Review into the investigation and prosecution of serious sexual offences.

The methodology for this research consisted of:

1. A comprehensive multidisciplinary literature review of scholarly material, policy documents, legislation and case-law, press releases and newspaper articles;
2. 16 semi-structured interviews with community and professional workers from within the sexual violence sector in NI to access perceptions of the current NI definition of rape and approach to consent, as well as possibilities for reform.

Interviewees had experience with a range of individuals and acknowledged that both men and women can be subject to sexual violence, and that sexual violence occurs among LGBTQ+ communities. Nonetheless, many referred to 'she/her' when discussing the complainant and 'he/him' when discussing the defendant. This language is reflected in some of the quotes in this paper.

Purposive sampling was used when recruiting participants for the study, with individuals chosen on the basis of their work in the area of sexual offences and ability to provide an insight into the operation, effectiveness and interpretation of the element of reasonable belief in consent. Those included in the study were therefore drawn from criminal justice professionals engaged with the trial process from report to court, those working in victim support organisations and those working in the health sector.

Participants took part on the basis of strict confidentiality and will remain anonymous. The interview questions were devised following a review of the relevant literature and focused on perceptions of the law, Gillen's proposals and whether there is a need for further clarification/reform in relation to consent, and, in particular, the element of 'reasonable belief'.

Consent in the Sexual Offences (NI) Order 2008

To establish an offence under Part 2 of the Sexual Offences (NI) Order 2008, the prosecution must prove that the sexual activity took place without the complainant's consent and that the defendant did not reasonably believe that that person consented.

A definition of consent as agreement by choice and having the freedom and capacity to make that choice is set out at Article 3. According to case law, consent is considered a state of mind and there is no legal requirement of resistance on the part of the complainant.

The meaning of consent, or absence thereof, is further illuminated by the inclusion of a number of rebuttable and irrebuttable presumptions as to consent and the defendant's reasonable belief at Articles 9 and 10.

The Order also provides that reasonableness will be determined with reference to the surrounding circumstances, including any steps taken by the accused to ascertain consent (see e.g., Article 5).

Concerns about 'Reasonable Belief'

The reasonableness standard is to be welcomed, as, prior to the 2008 Order, a defendant could avoid criminalisation if they honestly believed the complainant was consenting, even if that belief was unreasonable.¹ Nonetheless, a number of critiques of the reasonableness standard can be found in the literature. These include:

- **Allocation of Responsibility:** debates surrounding the way legal definitions of consent apportion responsibility between the complainant and the accused have arisen, with concern that it is the complainant's actions, as opposed to the defendant's, that determine whether the defendant's belief in consent is reasonable (Conaghan and Russell 2014).
- **Perception v Reality:** linked to questions of responsibility, there is concern that a defendant's implied belief in consent, based on their perception of the interaction, can be used to escape liability. The defendant's narrative is thus allowed to take precedence (Burgin and Flynn 2019).
- **Understandings of Consent:** while the law provides that any belief in consent must be reasonable, what is considered reasonable in the context of sexual relations differs from person to person and may be influenced by problematic attitudes towards consent. For instance, recent public attitude surveys have

found a tendency to justify sexual intercourse without consent where the complainant has failed to say 'no', physically resist, or has flirted with the defendant (see EVAW 2018).

- **Undermines the Law on Consent:** although case law, and now Gillen's recommendations (see below), provide that passivity does not constitute consent and that the complainant is not required by law to positively dissent, protest or resist to prove the absence of consent,² the reasonable belief standard creates a 'back-door' for these factors to be explored in the context of the defendant's mindset (Crowe and Lee 2020).

'Yes means Yes': The Potential of Affirmative Consent

There is no 'one size fits all' approach to affirmative consent. However, the essence of this model is that there should be positive agreement between the parties before sexual relations can take place. It is believed that this approach prioritises active communication and has the potential to remove any tendency to focus on whether the complainant resisted or said no.

The current NI definition encompasses an affirmative dimension, in that any determination of whether a belief in consent was reasonable must take account of any steps taken by the defendant to ascertain consent.

However, jury instructions as contained within the Crown Court Compendium provide that there is no obligation on the defendant to take steps (Judicial College 2019, chpt 20).

The NI approach can be compared to the Australian State of Tasmania where a belief in consent will not be considered honest or reasonable if the accused 'did not take reasonable steps in the circumstances'³ to ensure the other person was consenting, thus creating an in-built obligation.

Some jurisdictions have concentrated their efforts on the statutory definition of what consent is and how we identify its presence. For instance, Tasmania's approach, above, is supplemented by a provision explaining that consent does not exist if the person 'does not say or do anything to communicate consent'.⁴

Similarly, Iceland recently reformed its law of rape opting for a provision stating that 'consent is considered present if it is expressed by free will'.⁵ Sweden adopted a definition of rape which provides that a person commits rape if they have sex with 'a person who is not participating freely' and that 'in assessing whether the participation is voluntary or not, particular consideration shall be given to whether the voluntariness was expressed through words or deed or in some other way'.⁶

Thus, according to the law in Tasmania, Iceland and Sweden, consent is a performative act, as opposed to a state of mind as in NI. These laws can be viewed as a variation of what has been described as the 'only yes means yes' approach: if it is not a yes, it is a no.

The Gillen Proposals: Views from the Field

This research focused primarily on the proposal in the Gillen Review that the definition as to what constitutes a reasonable belief in consent should be amended so as the jury are now asked to take account of all the circumstances, including a failure to take any steps to ascertain whether the complainant consented. Other amendments include:

- The inclusion of a provision that a failure to say or do anything when submitting to a sexual act, or to protest or offer resistance to it, does not of itself constitute consent;
- Expansion of circumstances where there is an absence of consent to include intimidation, coercion, third party consent, or where the complainant is overcome by alcohol or drugs;
- Consent can be withdrawn at any time.

Participants' views on the reasonable belief amendment can be summarised as follows:

- **Reasonable belief in consent is not a key feature of the trial process:** worryingly, most participants explained that legal arguments tend to concentrate on whether the defendant took steps to ascertain consent. As one participant explained:

"It's almost more of a defensive mechanism where you're constantly on the back foot and are working out what behaviour did the victim do and then of course it becomes a trial of the victim rather than of the defendant".

This raises questions over the actual impact the change of wording would have in practice.

- **Shifting responsibility:** while reasonable belief may not currently be a focus, participants acknowledged that the judge will ask the jury to consider this element and that the proposal by Gillen might shift attention:

"...it would at least focus on what he didn't do. So he didn't or he could've asked her, he didn't take into account whether she was drunk..."

It was deemed to be more 'survivor or victim-led' and may also push the prosecution to advance this line of questioning.

- **Creating an obligation to take steps:** some participants felt it would be useful to create an obligation on the defendant to take steps rather than leaving it only as a consideration for the jury. As noted by one participant it would be...

'fantastic...even just for where the blame lies and the questioning lies...So just to know that the defendant is going to be asked the question did you play a part and what part did you play in ascertaining consent'

Others, however, felt it would be too difficult to implement: *'how do you describe that?'*

- **Defining a 'step':** currently there is no legal definition of what amounts to a 'step', and it was noted that it is difficult to know what is meant under this term or what the jury should be looking for. At the same time, it was noted that the law should not be overly prescriptive. One participant explained that:

"Steps could be built in reference to verbal, non-verbal body language but I think it could go one of two ways there because for example, if we're looking at body language, she invited him into the house".

- **Challenges of 'consenting':** some concern was raised that a shift to focusing on steps taken to ascertain consent might be reductive, as consent can be withdrawn at any time (see however Gillen's recommendation on right to withdraw consent), and that the defence would simply 'poke fun' at the prosecution. As one participant explained, the defence might say:

"...has anybody asked you [for consent], is that how it works or do things develop naturally between people?"

- **Defining what is 'reasonable':** on a broader level, most participants felt there was no need to define what constitutes a 'reasonable' or 'unreasonable' belief. It was however noted that the existing and proposed measures (e.g., current jury instructions on rape myths, Gillen's proposals on myth busting measures and the amendment to the consent definition to ensure lack of verbal or physical resistance does not constitute consent) could be supplemented by an explicit provision prohibiting questioning on the way a complainant was dressed for example. Further to this, it was suggested that it might be useful, particularly in the context of a coercive relationship, to draw the jury's attention to where there are *'other factors in place which the defendant is introducing to affect consent'*, such as inducements or manipulation.

The existence of these factors may render any belief in consent unreasonable.

- **Redefining consent:** some participants favoured definitions of consent that speak to its form (Iceland and Sweden above) as opposed to simply the context within which it is given (NI's current position). The language of participation in Sweden's definition was described as *'really nice, participation shows willingness and it also shows dual participants'*.

However, it was also noted that often in rape cases the defendant and the complainant give very different accounts, the prosecution will argue the complainant did not consent and made that clear, whereas the defence will argue that the complainant, either through words or actions, consented. As such, the actual definition may not make much of a difference in practice.

Moving forward: Strengthening Gillen's Proposals

All in all, Gillen's recommendations on consent and reasonable belief were positively received. However, there is still room for clarification in some areas.

In light of my research, three key recommendations are as follows:

1. **Procedural law:** amend article 28 of The Criminal Evidence (Northern Ireland) Order 1999 governing the admission of sexual history evidence to include a

judicial filter for questions relating to consent. The filter would prohibit problematic questions, such as those relating to what a complainant wore during the alleged incident and could also prohibit questions on consent, without leave of court, where the presumptions against consent (e.g. in the context of violence, intimidation etc) are triggered (see Dowds 2020, 206).

2. **Jury instructions:** devise wording to complement Examples 3 and 4 in the Crown Court Compendium that deal with submission and fear (Judicial College 2019, chpt 20) so as they also deal with the introduction of 'intimidation or coercive conduct or psychological oppression to the complainant or to others' as per the Gillen recommendations.

Frame the language so as it acknowledges the defendant's actions i.e., 'Did the defendant create an environment/situation of coercion/intimidation...?' and ensure instructions also deal with the defendant's mindset/reasonable belief: 'Was the defendant aware of this environment and its potential impact on the complainant's free will?...If so, any belief in consent cannot be said to have been reasonably held' (see Dowds 2019, 28).

3. **Jury instructions:** devise wording to complement Example 2 in the Crown Court Compendium on 'Reasonable belief in consent' (Judicial College 2019, chpt 20), so as it reflects the jurors' need to consider a defendant's failure to take steps, clarify that a step is a positive act but that it can be verbal or non-verbal. Explain that where there has been any ambiguity around consent, the jury can place more weight on the fact that the defendant made no effort to discern whether the complainant was consenting (see Dowds forthcoming 2021).

Beyond the recommendations made in this paper, it is essential that the law on reasonable belief in consent features within sexual offence trials.

If this element continues to be omitted from legal arguments, particularly from the prosecution arguments, then the requirement that the defendant take steps to ascertain consent will not be adequately investigated.

As such, there is a danger that the focus will continue to be on the actions or inactions of the complainant rather than those of the defendant.

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Footnotes

1. *DPP v Morgan* [1976] AC 182
2. *R v Malone* [1998] 2 CAR 447. See also international law: *MC v Bulgaria* 2003 Application no. 39272/98.
3. Section 14A(c) *Criminal Code Act 1924*
4. Section 2A,2(a) *Criminal Code Act 1924*
5. *Act on the amendment of the Criminal Code, no 19/1940, with subsequent changes (sexual offences) 2018*
6. *Criminal Code (Sweden) Brottsbalk (1962: 700) as amended in 2018*

Support Services

Rape Crisis Northern Ireland

T: 0800 0246 991

E: emailsupport@rapecrisisni.org.uk

Nexus NI

T: 028 9032 6803

E: Belfast@nexusni.org

Domestic and Sexual Abuse Helpline

T: 0808 802 1414

E: help@dsahelpline.org

MAP NI

T: 028 9024 1929

E: info@mapni.co.uk

Women's Aid

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