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Sexual Consent in Northern Ireland: The Social and Legal Dimensions

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Executive Summary

In Northern Ireland (NI) consent is a key concept in the law on sexual offences. Despite its centrality to determining the existence of a criminal offence, it is a concept that is subject to different and competing interpretations. This becomes even more complicated when the guilt or innocence of a defendant rests not only upon whether there was consent or not but whether the defendant's belief in consent was reasonably held.

Public debate on these issues came to the fore in 2018 as a result of a high profile rape trial, often referred to as 'the Rugby Rape Trial', and the law on consent was considered as part of an independent review into serious sexual offences led by Justice Gillen (the 'Gillen Review') ending in May 2019.

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 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'.

Introduction

The final report of the independent judge-led review into how the criminal justice system handles sex offences in Northern Ireland (NI) ('the Gillen Review'), was published on 9th May 2019. Among the recommendations in this final report are proposals on reforming the definition of consent as contained within the Sexual Offences (NI) Order 2008.

The Gillen Review was borne out of a joint call from victim organisations following the increased public interest in sexual violence and the judicial process as a result of a high-profile rape trial, now known as 'the Rugby Rape Trial' (see BBC 2018).

This trial, which lasted 9 weeks, ended on 28th March 2018 with the four accused, including two Ulster and Ireland rugby players, being found not guilty on all charges.

The trial dominated the local and international media and resulted in competing #IBelieverHer and #IBelieveHim social media campaigns. It laid bare the ongoing challenges associated with criminal justice responses to sexual violence that those working and researching in the area had long been familiar with.

Significantly, this case sparked important conversations and debates on the nature of sexual consent, with BBC Spotlight even staging a mock trial to delve into this important issue (Telford 2018). Indeed, often the key point of contention in sexual offence cases is not whether the sexual relations took place but whether they were consensual. Two related legal questions then arise:

1. Did the complainant consent?
2. Did the defendant believe that the complainant consented?

Such questions are complicated by ongoing debates around what consent is, how it is communicated, and its relationship with concepts such as coercion.

The Gillen Review engaged with these debates and, as mentioned, proposed changes to the legal provisions on consent as contained within the Sexual Offences (NI) Order 2008. The proposed changes are also set against a wider backdrop of reform occurring in jurisdictions across the globe and trends towards what has been described as an 'affirmative model of consent'. While variations of the affirmative consent model exist, the essence of this model

is that there should be positive agreement between the parties before sexual relations can take place: communication is key.

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 a failure by the defendant to take any steps to ascertain whether the complainant was consenting.

It draws from a Socio-Legal Studies Association (SLSA) funded project undertaken by the author in 2019/2020. The project employed a mixed methods approach resulting in new empirical data exploring perceptions of the legal definition of consent by community and professional workers in NI.

In this paper I consider how Gillen's proposal on reasonable belief in consent can be strengthened, in particular how it can be more clearly aligned with affirmative consent models. In this respect, three concrete recommendations, drawn from the SLSA project, are set out: 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 and the Law: Ongoing Challenges

Consent is the key concept separating permissible from impermissible sexual contact in many contemporary legal systems. Despite this, consent remains a vague concept. Figuring out what consent is, what it is not and how we assess an accused's knowledge of consent is extremely difficult.

Key questions that arise in this context are:

- Is consent a state of mind? Is it restricted to what someone was thinking at the time of the act?
- Is consent an action? Should consent or lack of consent be expressly communicated in some way?
- How do you know the other person is consenting? Should you be asking questions?
- What factors impact the validity of consent? Physical force may be one factor but what about action short of force or more subtle pressures?

The law in NI defines consent as agreement by choice and having the freedom and capacity to make that choice.¹ To establish a sexual offence the prosecution

must prove that the sexual activity took place without the complainant's consent and that the defendant did not reasonably believe that the person consented. The law currently provides a list of presumptions against consent and the defendant's belief, such as where violence is involved, or the defendant intentionally deceived the complainant.

In addition, the law provides that a defendant's reasonable belief in consent will be determined with reference to the surrounding circumstances, including any steps taken by the accused to ascertain consent. While the reasonableness standard is an improvement on the previous law where a defendant could avoid criminalisation if they honestly believed the complainant was consenting, even if that belief was unreasonable,² three key problems remain:

1. Attention is directed toward the complainant's actions and how the defendant perceived those actions as opposed to what those actions actually meant.
2. While steps taken by the defendant to ascertain consent can be considered, there is currently no obligation that the defendant actually take steps.
3. Even though the law has stated that passivity does not constitute consent and the complainant need not demonstrate resistance, such factors may find their way into considerations of the defendant's belief in consent.³

Indeed, 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). So, while there may be an acceptance that consent was absent, there is reluctance to formally designate this act as rape or sexual assault.

This is also reflected in findings from a 2016 survey amongst students at Queen's University Belfast, where 33.5% reported having experienced unwanted touching of a sexual manner, yet only 6.4% of respondents thought they had been assaulted (Haughey et al, 2017). This shows a lack of understanding of what consent is, which further complicates considerations of belief in consent.

'Yes means Yes': The Potential of Affirmative Consent

Affirmative models of consent emphasise communication and, while there is no one size fits all approach, require active signals of agreement before an encounter is considered consensual.

So, under this approach key aspects of consent are that:

- It is active
- It is ongoing
- It should be clearly sought and received
- It should manifest in some way, either through positive words or actions
- It can be withdrawn
- It is not passivity
- It is not implied from dress or previous conduct.

In this respect, an affirmative approach to consent limits the ability of an accused to argue they believed the complainant consented on the basis of a lack of refusal or physical resistance.

Consent under this approach is a performative act, rather than a state of mind, and if there is no positive affirmation on the part of the complainant there can be no consent and no reasonable belief in consent.

Some jurisdictions adopt this affirmative approach in their laws on sexual consent either by defining consent itself as a positive act, or by requiring the defendant to take steps to ensure consent was present.⁴

Although 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, there is no obligation that this key communicative component is acted upon.

Affirmative models of consent emphasise communication and require active signals of agreement before an encounter is considered consensual.

The Gillen Proposals: Views from the Field

The Gillen Review made a number of recommendations in relation to amending the law on consent, such as:

- 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 complainant is overcome by alcohol or drugs;
- The inclusion of a provision providing that consent can be withdrawn at any time;
- An amendment to the wording of circumstances that should be considered when determining a reasonable belief in consent so as the jury are now asked to consider a failure by the defendant to take steps to ascertain consent.

My research sought the views of community and professional workers in the sexual violence sector specifically in relation to whether the proposed amendment of the wording on 'reasonable belief' marks an improvement in the law or if it needs strengthened to be more in line with the affirmative approach.

Participants views can be summarised as follows:

- **Reasonable belief in consent is not a key feature of the trial process:** worryingly most participants explained that, currently, the defendant's belief in consent and any steps they took to ascertain consent are rarely touched on explicitly at trial:

"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 on the victim rather than of the defendant".

This raises questions over the actual impact the change in 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:** there were mixed views from participants in relation to creating an obligation, some viewed the idea as 'interesting' or 'fantastic' due to the fact that this aspect would be an essential element in the trial. Others viewed the creation of an obligation as 'implausible' or difficult to implement: 'how do you describe that?'
- **Defining a 'step':** while currently there is no legal definition of what amounts to a 'step', it was noted that some clarification could be provided without being overly prescriptive. One participant explained:

"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 there could be an explicit provision prohibiting questioning on the way a complainant was dressed for example. It was also suggested that it might be useful, particularly in the context of a coercive relationship, to draw the jury's attention to whether 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.

Moving forward: Strengthening Gillen's Proposals

All in all, Gillen's recommendations on consent and reasonable belief were positively received and have attempted to embed key principles of the affirmative consent model into legislation. However, in light of my research it is clear that there is still room for clarification in some areas. Three key recommendations are as follows:

1. **Procedural law:** create a judicial filter for dealing with questions of consent in existing NI procedural law (e.g. similar to article 28 of The Criminal Evidence (Northern Ireland) Order 1999 dealing with sexual history evidence). The filter would prohibit problematic questions such as those relating to what a complainant wore during the alleged incident. The filter could also prohibit questions on consent where the presumptions against consent (e.g. in context of violence, intimidation etc) are triggered (see Dowds 2020, 206).
2. **Jury instructions:** devise jury instructions to 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 and ensure instructions also deal with the defendant's mindset/ reasonable belief (see Judicial College 2019, chpt 20 and Dowds 2019, 28).
3. **Jury instructions:** devise jury instructions so as they reflect 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, and 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 Judicial College 2019, chpt 20 and Dowds forthcoming 2021).

Finally, it is essential that prosecutors engage with the law on reasonable belief and any failure by the defendant to take steps to ascertain consent.

If the law simply remains as law on the 'books' as opposed to law in 'action', then the legal arguments presented by the parties, and the considerations of these by the jury, will continue to focus on the actions or inactions of the complainant rather than those of the defendant.

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Footnotes

1. For relevant provisions on consent and sexual offences see Part 2 of the Sexual Offences NI Order 2008.
2. *DPP v Morgan* [1976] AC 182.
3. *R v Malone* [1998] 2 CAR 447. See also international law: *MC v Bulgaria* 2003 Application no. 39272/98.
4. See for example the approaches in Iceland and Sweden, as well as the Australian state of Tasmania.

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

T: 028 9024 9041

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