



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Response to Department of Justice Consultation
on Non-Fatal Strangulation**

September 2021

Table of Contents

Summary of Recommendations	3
1.0 Introduction	4
2.0 Standalone Offence	5
Human Rights Standards	6
3.0 Gender-Based Violence	9
4.0 Consent to harm for sexual gratification: not a defence	10
5.0 UK Domestic Abuse Act 2021	11
6.0 Disaggregated data	12
7.0 Education, training and awareness raising	13

The NIHRC recommends:

- i. the Department of Justice introduces legislation that creates a standalone offence for non-fatal strangulation in order to comply with the positive obligations under Articles 2, 3 and 8 ECHR.**
- ii. the UK government ratify the Istanbul Convention at the earliest available opportunity and the Department and NI Executive take the appropriate steps to ensure compliance with all aspects of the Convention**
- iii. the proposed legislation should include an element that protects against gender-based violence, using the UN CEDAW, UN CAT and Istanbul Convention as a guide.**
- iv. The Department introduces legislation to outlaw the use of consent to harm for sexual gratification as a defence and that the legislation precludes the defence being used for the offence of non-fatal strangulation.**
- v. the Department introduces legislation that ensures as a minimum parity of provision for non-fatal strangulation with England and Wales, so that victims in NI are provided with at least equal protection.**
- vi. the Department works with the relevant public authorities and civil society organisations to systematically collect and publish data on non-fatal strangulation that is disaggregated by sex, gender, ethnicity, disability and age. It should also record the journey of non-fatal strangulation offences through the criminal justice system, including number of initial reports, number of referrals to the Public Prosecution Service, how many reach different stages of the court process, how many prosecutions occur, what is the resulting remedy and how often offences are repeated.**
- vii. That in advance of ratification the Department meets the commitments contained within the Istanbul Convention concerning research, awareness-raising, education and training of professionals.**
- viii. the UK Government and NI Executive to fulfil their obligations outlined in the NI (Executive Formation etc.) Act 2019. continues including the introduction of age appropriate and scientifically based reproductive and sexual health education. This should include addressing the meaning of consent, healthy relationships and prevention of gender based violence. This will require cross departmental collaboration.**
- ix. call on the Department to facilitate the introduction of the training recommendations within the Gillen Review as swiftly as possible.**

1.0 Introduction

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

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

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

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

¹ Ratified by the UK 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).

² Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 11 April 2011 (Not ratified by UK).

³ Ratified by the UK 1966.

⁴ Ratified by the UK 1986.

⁵ Ratified by the UK 1988.

⁶ Ratified by the UK 1989.

⁷ Ratified by the UK 2009.

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

1.4 The NIHRC welcomes the Department's consultation to consider the introduction of legislation to create a standalone offence for non-fatal strangulation.

2.0 Standalone Offence

2.1 The NIHRC has continuously called for the need to introduce legislation to create a new standalone offence of non-fatal strangulation.¹³

2.2 Currently, the offence of choking, suffocation or strangulation is legislated for in Section 21 Offences Against the Person Act 1861. It can only be tried in the Crown Court and carries a maximum penalty of a life sentence. A component part of the offence is that the offender also intended to commit a further indictable offence. The impact of this, is that most strangulation cases are progressed under alternative charges and is most commonly charged under Common Assault which negates capturing the gendered element of the offence, the appropriate sentencing and offender rehabilitation required. A standalone offence of non-fatal strangulation will require criminal justice authorities to address the severity of the offence and understand links between strangulation, domestic abuse and homicide.

2.3 In 2019 the Criminal Justice Inspectorate for NI conducted a thematic inspection into the handling of domestic abuse in NI. During the fieldwork Inspectors discussed this issue with PPS prosecutors who agreed that Section 21 was a very difficult section of the legislation to use. Inspectors

⁸ CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019.

⁹ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019.

¹⁰ CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender-based V against Women', 26 July 2017.

¹¹ CCPR/C/GC/32, 'UN Human Rights Committee General Comment No 32: Article 14 on the Right to Equality Before the Courts and Tribunals and to a Fair Trial', 23 August 2007, at para 29.

¹² UN General Assembly, 'Declaration on the Elimination of Violence against Women', 20 December 1993.

¹³ For example, NI Human Rights Commission, 'Response to the Department of Justice Consultation on Consent to Serious Harm for Sexual Gratification: Not a Defence', April 2021 and NI Human Rights Commission, 'Advice to the Department of Justice: Domestic Abuse and Family Proceedings Bill', June 2020.

were advised that this issue had not been included in considerations around developing the domestic abuse legislation. The Criminal Justice Inspectorate recommended that the Department should review the inadequacies in current legislation regarding the act of choking or strangulation by defendants.¹⁴

Human Rights Standards

- 2.4 The NIHRC acknowledges the Department's understanding that strangulation can occur in different contexts. Strangulation is a feature of most of the homicides and non-fatal assaults that have involved the use of the rough sex defence by the perpetrator. This has been the case in several incidents in Northern Ireland, for example, by a Lisburn man in 2019 and three men in County Antrim in 2020.
- 2.5 Article 2 ECHR protects the right to life and Article 3 ECHR provides freedom from torture, cruel, inhuman or degrading treatment and punishment.¹⁵ Article 2 and Article 3 ECHR also require positive obligations in relation to investigation of abuses. The European Court of Human Rights (ECtHR) has been clear that these provisions contain positive obligations to ensure these fundamental rights are protected.
- 2.6 The ECtHR has provided that there are positive obligations under Article 2 ECHR to take appropriate steps to safeguard the lives of those within its jurisdiction to apply in the context of any activity, whether public or not, in which the right to life may be at stake.¹⁶ This requires public authorities to take reasonable steps when they know of or ought to have known of real and immediate threats to life, including by a third party non-State actor.¹⁷ Article 3 ECHR is an absolute right which provides that this right must never be interfered with under any circumstances.¹⁸
- 2.7 The ECtHR has held that the State has a responsibility to protect individuals from violence by third parties. This has been particularly true in cases involving victims of domestic violence. While there are often violations of Articles 2 and 3 ECHR in such cases, Article 8 ECHR is also engaged because violence threatens the bodily integrity aspect of the right to respect for private life. Under Article 8 ECHR, States have a duty to protect the physical and moral integrity of an individual from other

¹⁴ Criminal Justice Inspectorate NI, 'No Excuse Public Protection Inspection II: A Thematic Inspection of the Handling of Domestic Violence and Abuse Cases by the Criminal Justice System in NI', July 2019.

¹⁵ Article 2 ECHR; Article 3 ECHR.

¹⁶ *Case of Centre for Legal Resources on Behalf of Valentin Campeanu v Romania* (2014) ECHR 14.

¹⁷ *Osman v UK* (1998) ECHR 101, at para 116.

¹⁸ *Chahal v UK* (1996) ECHR 413.

persons, which requires affording protection against acts of violence by private individuals.

- 2.8 Article 8 ECHR ensures protection of a private and family life.¹⁹ It is a qualified right, which means limitations are allowed if they are “in accordance with the law” and are “necessary in a democratic society” for the protection of one of the objectives set out in Article 8(2) ECHR, in this instance “for the prevention of disorder or crime” and “the protection of the rights and freedoms of others” The ECtHR clarified that “necessary” in this context does not have the flexibility of such expressions as “useful”, “reasonable”, or “desirable” but implies the existence of a “pressing social need” for the interference in question.²⁰
- 2.9 The ECtHR has provided that safeguarding physical integrity under Article 8 ECHR requires an effective criminal investigation.²¹ Compliance with Article 8 ECHR in the sphere of protection against acts of individuals is within the State’s margin of appreciation, yet effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions.²²
- 2.10 The ECtHR has considered several cases where the lack of appropriate legislation or investigation addressing violence against women has proved incompatible with the state’s positive obligations under Articles 2, 3 and 8 ECHR.
- 2.11 The case *Tërshana v. Albania* concerned an acid attack on the applicant by her former husband, whom she accused of domestic violence. She alleged that the Albanian authorities had failed to take measures to protect her from the acid attack and to conduct a prompt and effective investigation for the identification, prosecution and punishment of her assailant. The Court held that there had been a violation of Article 2 ECHR in its procedural aspect, finding that the authorities’ response to the acid attack had been ineffective. It noted in particular that the attack had the hallmarks of gender-based violence and therefore should have incited the authorities to react with special diligence.²³

¹⁹ Article 8 ECHR; Article 14 ECHR.

²⁰ *Dudgeon v UK* (1981) ECHR 22.

²¹ *MC v Bulgaria* (2003) ECHR 646.

²² *MC v Bulgaria* (2003) ECHR 646, at para 166.

²³ *Tërshana v. Albania* (2020).

- 2.12 In the case *E.M. v. Romania* the applicant alleged that the investigation into her criminal complaint of domestic violence committed had not been effective. The Romanian courts had dismissed the applicant's complaints on the ground that her allegations that she had been subjected to violence by her husband had not been proven. The Court held that there had been a violation of Article 3 ECHR under its procedural limb, finding that the manner in which the investigation had been conducted had not afforded the applicant the effective protection required by Article 3. It observed in particular that, when making the first of her complaints, the applicant had requested assistance and protection from the authorities for herself and her daughter against her husband's aggressive conduct. Despite the fact that the statutory framework provided for cooperation between the various authorities and for non-judicial measures to identify and ensure action was taken in respect of domestic violence, and although the medical certificate provided prima facie evidence of the applicant's allegations, it did not appear from the case file that any steps had been taken to that end.²⁴
- 2.13 In the case *Sandra Janković v. Croatia* the applicant alleged that despite her attempts to have her allegations of being attacked and threatened by her flatmates investigated, the authorities had failed to ensure her adequate protection. The Court held that there had been a violation of Article 8 ECHR on account of the failure by the Croatian authorities to adequately protect the applicant from an attack on her physical integrity and of the manner in which the national criminal law mechanisms had been implemented, contrary to the State's positive obligations under Article 8. Although the applicant tried to get a criminal case brought, it was dismissed by the domestic courts. She then brought a complaint relying on Articles 3 and 8 of the Convention before the ECtHR. The applicant argued that the national authorities failed to afford her adequate protection against violence inflicted by private individuals, which was an Article 8 violation. The Court agreed that Article 8 applied due to the circumstances under which she had been attacked and found that Article 8 had been violated due to the delay of the authorities in prosecuting the crime.²⁵

2.14 The NIHRC recommends that the Department of Justice introduces legislation that creates a standalone offence for non-fatal strangulation in order to comply with the positive obligations under Articles 2, 3 and 8 ECHR.

²⁴ *E.M. v. Romania* (2012) ECHR 400.

²⁵ *Sandra Janković v. Croatia* (2008) ECHR 24.

3.0 Gender-Based Violence

- 3.1 The offence of non-fatal strangulation disproportionately affects women and girls. Women's Aid report that it is widely recognised that non-fatal strangulation and asphyxiation are a common feature of domestic abuse. In addition, research highlights how non-fatal strangulation is frequently used as a tool to exert power and control, and to instil fear, rather than being a failed homicide attempt.²⁶ The lack of standalone offence fails to recognise the gendered dimension of the violence associated with non-fatal strangulation.
- 3.2 The UN CAT Committee in its 2019 Concluding Observations on the UK raised concerns of sexual and gender-based violence.²⁷ The UN CAT Committee stated it is concerned about reports that State party officials are recording increasing numbers of domestic abuse crimes and sexual offences, mainly against women, while also recording low prosecution and conviction rates in these cases.²⁸
- 3.3 The UN CEDAW Committee, in its 2019 Concluding Observations on the UK, noted "with particular concern the inadequacy of laws and policies to protect women in Northern Ireland (from gender-based violence)" and recommended that the UK ratify the Istanbul Convention.²⁹
- 3.4 The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) provides a legal framework at pan-European level to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence. The UK Government has made it clear that it intends to ratify the Istanbul Convention and is currently in the process of addressing existing areas of non-compliance, such as extending its protections regardless of immigration status, criminalisation of psychological control across the UK, ensuring extraterritorial application, and protecting those that are reliant on spousal/partner support for residence status.³⁰
- 3.5 Article 35 of the Istanbul Convention relates to physical violence and provides that state parties shall take the necessary legislative or other measures to ensure that the intentional conduct of committing acts of physical violence against another person is criminalised.

²⁶ Women's Aid, 'Domestic Abuse Bill: Women's Aid Briefing for Committee Stage', January 2021.

²⁷ CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 56; CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 29.

²⁸ Ibid.

²⁹ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019, at para 29.

³⁰ Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017; Home Office, 'Ratification of the CoE Convention on Combating Violence against Women and Girls and Domestic Violence (Istanbul Convention) – 2020 Report on progress' (HO, 2020), at Annex A.

3.6 Article 36 of the Istanbul Convention relates to sexual violence, including rape. It requires that:

Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

- a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
- b) engaging in other non-consensual acts of a sexual nature with a person;
- c) causing another person to engage in non-consensual acts of a sexual nature with a third person.

Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.

3.7 Article 43 of the Istanbul Convention provides that offences established in accordance with the Convention shall apply regardless of the nature of the relationship between victim and perpetrator.

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

3.9 The NIHRC continues to recommend the UK government ratify the Istanbul Convention at the earliest available opportunity and the Department and NI Executive take the appropriate steps to ensure compliance with all aspects of the Convention.

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

4.0 Consent to harm for sexual gratification: not a defence

4.1 Strangulation is a feature of most of the homicides and non-fatal assaults where the perpetrator has used the rough sex defence or consent to harm for sexual gratification.³¹

³¹ We Can't Consent to This. Available at: <https://wecantconsenttothis.uk/actnow>

- 4.2 The Commission responded to the Department's consultation on 'Consent to Serious Harm for Sexual Gratification: Not a Defence'.³² The Commission would refer the Department to the Commission's response as there is significant overlap in issues relating to gender related violence and the use of the defence by perpetrators of non-fatal strangulation offences.
- 4.3 In its response, the NIHRC recommended the Department of Justice bring forward appropriate legislative change as soon as is practicable for non-fatal strangulation to be regarded as a standalone offence and that any legislative change should be clear that the defence of consent to harm for sexual gratification can no longer be used for non-fatal strangulation.
- 4.4 The NIHRC recommends that the Department introduces legislation to outlaw the use of consent to harm for sexual gratification as a defence and that the legislation precludes the defence being used for the offence of non-fatal strangulation.**

5.0 UK Domestic Abuse Act 2021

- 5.1 Within the UK Domestic Abuse Act 2021, a person is guilty if that person unlawfully strangles or suffocates another person. However, the Act only applies to England and Wales. If found guilty the person can face a summary conviction of imprisonment for a term not exceeding 12 months (or 6 months, if the offence was committed before the coming into force of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020), or a fine, or both; or on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or both.³³
- 5.2 The NIHRC understands the Department has asked where the new offence should be tried in the Magistrates' courts should the maximum sentence be 6 months, 12 months or 2 years. In addition, if a new offence is tried in the Crown Court, should the maximum sentence be 5 years or 7 years.
- 5.3 The Commission would highlight that the provision and sentencing for non-fatal strangulation should reflect human rights standards. The Istanbul Convention provides that:

³² NI Human Rights Commission, 'Response to the Department of Justice Consultation on Consent to Serious Harm for Sexual Gratification: Not a Defence', April 2021.

³³ Section 75A, Domestic Abuse Act 2021.

Parties shall take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention.

5.4 The Commission would further highlight provision within the recent Domestic Abuse Act that creates provision for strangulation or suffocation to include its application extraterritorially to British citizens acting outside of the UK.³⁴

5.5 The Commission recommends the Department introduces legislation that ensures as a minimum parity of provision for non-fatal strangulation with England and Wales, so that victims in NI are provided with at least equal protection.

6.0 Disaggregated data

6.1 The UN CEDAW Committee in its 2019 concluding observations on the UK recommended that the UK Government and NI Executive “systematically collect and publish data, disaggregated by sex, gender, ethnicity, disability and age, throughout the whole of its territory to inform policymaking and assess the impact of measures taken”.³⁵

6.2 Article 11 of the Istanbul Convention relates to data collection and research and requires state parties to undertake and collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of the Convention.

6.3 Collection of data and reporting on the implementation and effectiveness of the new legislation is essential. The Department will require its own data to understand if the standalone offence has had the intended effect and whether further measures in law, in training or in guidelines are required.

6.4 The NIHRC recommends that the Department works with the relevant public authorities and civil society organisations to systematically collect and publish data on non-fatal strangulation that is disaggregated by sex, gender, ethnicity, disability and age. It should also record the journey of non-fatal strangulation offences through the criminal justice system, including number of initial reports, number of referrals to the Public Prosecution

³⁴ Section 75B, Domestic Abuse Act 2021.

³⁵ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 26(d).

Service, how many reach different stages of the court process, how many prosecutions occur, what is the resulting remedy and how often offences are repeated.

7.0 Education, training and awareness raising

7.1 The NIHRC would direct the Department to the Commission's response to the 'Consent to harm for Sexual Gratification: Not a Defence' consultation in which the Commission outlined recommendations on developing a parallel programme for education which is also applicable to education concerning non-fatal strangulation. This includes detail on specific recommendations highlighted within the Gillen Review as well as the requirements within the NI (Executive Formation etc.) Act 2019 to recommend the introduction of age appropriate and scientifically based reproductive and sexual health education that addresses the meaning of consent, healthy relationships and prevention of gender based violence.³⁶

7.2 The NIHRC would highlight chapter 3 of the Istanbul Convention which outlines particular measures in relation to prevention of violence against women including offences such as non-fatal strangulation.

7.3 Article 13 of the Istanbul Convention requires states to:

promote or conduct, on a regular basis and at all levels, awareness-raising campaigns or programmes, including in co-operation with national human rights institutions and equality bodies, civil society and non-governmental organisations, especially women's organisations, where appropriate, to increase awareness and understanding among the general public of the different manifestations of all forms of violence covered by the scope of this Convention, their consequences on children and the need to prevent such violence. Parties shall ensure the wide dissemination among the general public of information on measures available to prevent acts of violence covered by the scope of this Convention.

7.4 Article 14 of the Convention relates to education and requires the state:

shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and

³⁶ NI Human Rights Commission, 'Response to the Department of Justice Consultation on Consent to Serious Harm for Sexual Gratification: Not a Defence', April 2021.

men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education.

Parties shall take the necessary steps to promote the principles referred to in paragraph 1 in informal educational facilities, as well as in sports, cultural and leisure facilities and the media.

7.5 Article 15 of the Convention relates to training of professionals. It states that:

Parties shall provide or strengthen appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the scope of this Convention, on the prevention and detection of such violence, equality between women and men, the needs and rights of victims, as well as on how to prevent secondary victimisation.

Parties shall encourage that the training referred to in paragraph 1 includes training on coordinated multi-agency co-operation to allow for a comprehensive and appropriate handling of referrals in cases of violence covered by the scope of this Convention.

7.6 The NIHRC recommends that in advance of ratification the Department meets the commitments contained within the Istanbul Convention concerning research, awareness-raising, education and training of professionals.

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

7.8 The NIHRC continues to call on the Department to facilitate the introduction of the training recommendations within the Gillen Review as swiftly as possible.

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