

NON-FATAL STRANGULATION: A NEW OFFENCE; AN OLD ISSUE?

1. CONTEXT AND OVERVIEW

- 1.1 This review was commissioned by Foyle Women's Aid with support from the Department of Justice. Its aim is to begin a comprehensive assessment of the nature and scale of non-fatal strangulation in Northern Ireland and to assist in identifying further steps that could be taken to address this devastating offence. This study considered non-fatal strangulation within intimate partner violence and abuse. This review does not explore consensual activity but does refer to and recognise the critical importance of the removal of the so-called 'rough sex' defence to serious harm or death.
- 1.2 This review did not consider the work that was undertaken, for example by the PSNI or the PPS, since introduction of the new offence. It should however be acknowledged that significant work is ongoing to train, operationalise and monitor.¹ To ensure that victims are well served as a result of the introduction of a stand-alone offence, this should continue to be monitored. The PSNI, PPS and DOJ have already committed significant resources, time and effort to ensuring that NFS is not only addressed but tackled. They have shown considerable appetite for change, which is welcomed. As this law becomes embedded all who work with victims can unite to ensure each is better protected.

¹ This review was time-limited. It was not an exercise in assessing the work of agencies, but an examination of NFS. It is intended to inform future work but not to critically evaluate the recent work of relevant agencies. Others are well placed to do that in due course, after the offence has been in place for some time. For example, the NI Policing Board might consider monitoring and evaluating use of the offence and the PPS might consider working with CJINI in the same manner.

- 1.3 Strangulation is an extremely serious, terrifying and life-threatening form of violence often used to coerce, control and intimidate victims. To understand why the law had to be amended to provide a standalone offence, one must understand what it is and where it fits within recognised patterns of domestic and sexual violence and abuse.
- 1.4 Strangulation as a method of violence is not a new phenomenon – it is as old as violence itself.² Strangulation that leads to death has been documented for centuries and is usually punished as homicide – murder or manslaughter, depending upon the circumstances. In Northern Ireland, between January 2013 and January 2023, seven people were convicted of murder where strangulation as the cause of death was recorded in the prosecution file.³ Homicide, as a matter of law, is a relatively easy offence to prosecute. If the strangulation or asphyxiation did not result in death however this was, perversely, more difficult as a matter of law to prosecute.
- 1.5 Strangulation or asphyxiation, which was not intended to and does not result in death, is often used as a means of coercion, control, intimidation and forced submission. Hereafter it will be referred to as non-fatal strangulation (NFS). Unless recorded as attempted murder or used as a means to commit another indictable offence, there was no separate category of offence, until now. As the law stood, police found it challenging to prosecute the act of strangulation or asphyxiation because the legislation required them to prove that the perpetrator strangled or asphyxiated their victim in an attempt to commit a further indictable offence.
- 1.6 By way of example, the PSNI has noted that “if a person had been strangled in what was believed to be a sexually motivated attack, the officer would have to show that the perpetrator intended to commit

² Strangulation as a means of murder is well-known but strangulation as an offence in and of itself is only now receiving attention.

³ Six were women strangled by their partner or former partner: PSNI recorded statistics.

sexual assault. Now it is a standalone offence that takes into consideration not only the physical impact but also the mental trauma and fear experienced by the victim.”⁴ It is arguable that without the standalone offence the police could have prosecuted the injury caused by strangulation in the absence of an injury obvious to the eye if the medical evidence was better understood. That aside, the introduction of a standalone offence will undoubtedly make it easier to identify and prosecute what is now recognised as extremely serious offending.

- 1.7 Within three days of the offence becoming operational in Northern Ireland, a man appeared before a court in Fermanagh charged with NFS on his female partner. The PSNI reported “On Monday [29th June] we communicated to the public a landmark piece of legislation being made operational in Northern Ireland. Already we have been able to act safeguarding a potential victim and make the first arrest and charge of this nature. This only serves to reiterate our commitment to tackling this horrific crime.”⁵ By the end of July 2023, there had been 49 people arrested for the new offence, of which 26 had been charged.⁶
- 1.8 The prevalence of NFS, where there is intimate partner violence, is already recognised, but not yet well documented. Between January 2013 and December 2022, “there were nearly 164,000 domestic abuse offences recorded by the Police Service of Northern Ireland. This includes those who reported having been strangled by their abuser.” As part of its awareness raising on the launch of the new offence the PSNI continued “on average between 10-12% of reporting domestic abuse victims have experienced non-fatal strangulation, placing them at the highest risk. In fact, studies have shown that in domestic abuse settings, victims are eight times more likely to be murdered by their partner if they have previously strangled them.”

⁴ Non-Fatal Strangulation Toolkit (Partners), PSNI.

⁵ Detective Superintendent Lindsay Fisher, PSNI, Public Protection Branch, 29 June 2023.

⁶ See BBC News Online 28 July 2023.

- 1.9 Now that there is a standalone offence, the proper recording and documentation of NFS will be possible. Thereafter, it will be possible to assess the prevalence in Northern Ireland and allocate appropriate resources to tackle it.
- 1.10 This review reflects the fact that research to date demonstrates the highly gendered nature of strangulation as part of intimate partner violence and abuse. In that context, it is almost entirely perpetrated by men on women. We know that many murders are committed by means of strangulation or asphyxiation, particularly the murders of women by men. There are too many cases to transcribe here but some recent examples of domestic homicides, with strangulation, include women such as Patrycja Wyrebek; Giselle Marimón-Herrera and Allison Marimón-Herrera; Alice Morrow; and the alleged murder of Natalie McNally.⁷ We know, beyond any shadow of a doubt, that the risk associated with strangulation is very high indeed. As explained, “Neck structures are alarmingly fragile: blocking the jugular vein can take less pressure than opening a can of Coke.”⁸
- 1.11 Non-fatal strangulation is a significant feature of coercion and control, assault, rape and the killing of women by men. Men can of course be, and often are, victims of violence but non-fatal strangulation as a means of coercion, control and intimidation is, so far, appearing in the statistics as a male-on-female phenomenon.⁹ We know that women who were the victims of completed or attempted homicide, whether by

⁷ Natalie was allegedly murdered in NI in 2022. Natalie’s former boyfriend has been charged and is awaiting trial. . Patrycja was murdered in Northern Ireland by her partner in August 2020. Giselle and Allison (mother and daughter) were murdered by Giselle’s partner in Northern Ireland in 2019. Alice was murdered by her partner in Northern Ireland in April 2019.

⁸ *The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review*, October 2020, Helen Bichard, Christopher Byrne, Christopher W. N. Saville , and Rudi Coetzer.

⁹ See further below.

strangulation or otherwise, were “far more likely to have a history of strangulation”.¹⁰ It has been described as a “hidden epidemic”.¹¹

1.12 Under the old law, if a victim survived being strangled, despite the very real potential for it to cause significant and life-changing injury, the act of strangulation in itself did not constitute a criminal offence. A stand-alone offence of NFS has now been enacted.¹² That amendment has had a powerful impact on setting societal norms; this recognition in statute is important and supports a renewed focus on tackling violence against Women and Girls.¹³

1.13 Too many women and girls are victims of violence and abuse.¹⁴ This is a serious human rights issue, which has a disproportionate impact upon women and girls. It is therefore also an issue of discrimination. Only by understanding violence against women and girls in its wider context and recognising the need for specific law, such as this law, relating to non-fatal strangulation, will we have any chance of success in tackling such violence. While the new law is critically important, the law alone is not sufficient to tackle the wider issue of violence against women and girls.

1.14 By way of overview:

- We know that non-fatal strangulation is a feature of many women’s experiences;
- We know that violence against women and girls is prevalent across Northern Ireland;

¹⁰ J Emerg Med. Author manuscript; available in PMC 1 October 2009.

¹¹ Helen Bichard and others, “The Neuropsychological Outcomes of Non-Fatal Strangulation in Domestic and Sexual Violence: A Systematic Review” (2020) *Neuropsychological Rehabilitation*

¹² Section 28 Justice (SOTV) Act (NI) 2022 in force 26 June 2023.

¹³ There is a new provision which removes the so-called rough sex defence or defence to NFS where serious harm is caused for sexual gratification. This is explained further below.

¹⁴ It is known that many forms of violence affect women and girls disproportionately. That includes domestic violence and abuse and sexual offences. Strangulation is a common feature of those forms of offending, thereby also affecting women disproportionately. What we also know, so far, is that there is a disproportionate incidence of non-fatal strangulation as a means of intimate partner violence, which is almost exclusively suffered by women at the hands of men.

- We know that domestic violence and abuse are at their highest levels in many years;
- We know that a high proportion of domestic homicides of women have involved strangulation;
- We know that the numbers collected to date are likely to represent a mere fraction of the overall scale of the issue;
- More needs to be done.

2. WHAT NON-FATAL STRANGULATION ACTUALLY IS

- 2.1 There are five common ‘methods’ of strangulation: manual application of pressure; chokehold where external pressure is applied by an arm around the neck; ligature being tightened around the neck; hanging by ligature; application of pressure by a foot or knee.¹⁵ Non-fatal strangulation is simply strangulation that does not result in death.
- 2.2 It is important that the language used is appropriate. Strangulation is not choking (despite the wording of the statute prior to June 2023). Choking is the mechanical obstruction of the windpipe for example when one ‘chokes’ on food. This distinction is more than pedantic. The professionals must use the correct term and record it while recognising that victims may still refer to it as choking (because that has become the colloquial way of referring to strangulation).
- 2.3 It is incontrovertible that any allegation or evidence of non-fatal strangulation should be treated as an immediate red flag to elevate the assessment of risk. We know that “a man who strangles a woman once, is 800% more likely to later kill her.”¹⁶ As explained in a UK study, in June 2020, NFS must be taken very seriously indeed “not simply because NFS could ‘accidentally’ end as homicide, but because people who use strangulation are more dangerous.”¹⁷ It is also demonstrated that incidents of non-fatal strangulation are frequently accompanied by death threats.¹⁸ It has been reported, “Many domestic violence offenders and rapists do not strangle their partners to kill them; they strangle them to let them know they *can* kill them – any time they wish.”¹⁹ Research

¹⁵ *Non-fatal strangulation, St Mary’s Centre SARC, Manchester University NHS Foundation Trust training materials.*

¹⁶ Gwinn C, *ibid* and see The Lethality Assessment Program Maryland Model 2005.

¹⁷ Non-Fatal Strangulation A summary report on data collected from SUTDA survey Completed by Dr Jane Monckton Smith University of Gloucestershire, June 2020.

¹⁸ Archana Nath, “Survival or Suffocation: Can Minnesota’s New Strangulation Law Overcome Implicit Biases in the Justice System” (2007) 25 *Law and Inequality* 253, 269.

¹⁹ Domestic Violence Report Vol 19, No. 6, ISSN 1086-1270, August/September 2014.

demonstrates that 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.

- 2.4 Gael Strack and Casey Gwynn refer to strangulation as “the edge of homicide”.²⁰ If a person has been strangled by their partner,²¹ the risk of attempted murder increases sevenfold, and death by a factor of eight. Not being able to breathe – air hunger – is a primal fear.²² It has also been described as “a uniquely intimate act of terrorism”.²³
- 2.5 The physical and mental effects of strangulation and asphyxiation are very serious indeed, even if in some cases there is no outward sign of damage.
- 2.6 The following is a summary of findings from peer-reviewed medical research.

Consciousness can be lost within 4 seconds of arterial pressure. Losing consciousness indicates at the very least a mild brain injury. Consciousness was lost in 17% to 38% of strangulation incidents identified in the survey. Paralysis, movement disorders, speech disorders, incontinence, and seizures can result. There are cognitive consequences which include amnesia and impaired executive function that affects decision-making, planning and judgement. The researchers observed “It is thought strangulation might be the second most common cause of stroke in women under 40.” They went on to consider psychological consequences of strangulation and found cases involving Post-Traumatic Stress Disorder, dissociation, suicidal ideation, depression, anxiety, and personality change. They also found

²⁰ Strack & Gwynn, 2011, p.32.

²¹ Note, this research has shown only women strangled by men. Further research is required as to the gendered nature of this violence. Clearly, it is important that victims are not overlooked.

²² Strack et al., 2001

²³ Johnson, 2010.

behavioural consequences to include women becoming increasingly compliant and submissive or showing “survival-based aggression”.²⁴

2.7 It has been noted that a person who had been strangled to the point of loss of consciousness “would almost certainly have had amnesia for that portion of the attack, but she could also have had wider memory loss: she had simply forgotten what he had done. It could be the result of damage to brain areas involved in problem-solving or planning an escape, or symptomatic of general confusion due to an oxygen-starved brain.”²⁵ Strangulation has also been associated with miscarriage and pre-term births.²⁶

2.8 In another comprehensive study, it is explained thus: “The act of strangulation is particularly dangerous on two levels. At the first level it may cause a range of short- and long-term health issues...Physical injuries including bruising around the neck and petechial haemorrhages are not uncommon and it can cause injury to the brain through hypoxia resulting in unconsciousness, headaches, depression and anxiety and problems with memory and concentration. At the second level non-fatal strangulation is associated with an increased risk of future harm and death...The victims are experiencing what they believe is the end of their life. They are suffering extreme physical pain, and severe psychological trauma. The pain and trauma are specifically related to this particular assault of strangulation...Most respondents truly believed they were going to die.... in a large number of responses the perpetrator was stating their intention to kill. This suggests that the perpetrators were well aware of what they were doing, were controlled enough to speak of their intentions, and to stop before death occurred.”²⁷

²⁴ *The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review*, October 2020, Helen Bichard, Christopher Byrne, Christopher W. N. Saville, and Rudi Coetzer.

²⁵ WCCTT website, news, 2020

²⁶ Maureen Funk and Julie Schuppel, “Strangulation Injuries” (2003) 102 *Wisconsin Medical Journal* 41.

²⁷ *Examining Associations Between Strangulation and Depressive Symptoms in Women with Intimate Partner Violence Histories*, *Violence and Victims* Vol. 33, Issue 6, Dec 2018, DOI.

3. WHY A STANDALONE OFFENCE?

- 3.1 Historically, there was legitimate concern that non-fatal strangulation was trivialised, not least because violence against the person includes “a wide range of offences from minor assaults such as pushing and shoving that result in no physical harm to murder” and non-fatal strangulation often does not reveal obvious injury without further examination. The PSNI argues it is essential the gravity and high-risk indicators that are attached to occurrences of strangulation are recognised. The PSNI observed: “In itself a positive affirmation to previous incidents of ‘choking or strangulation’ would be a high-risk factor linked with potential for domestic homicide, recognising that incidents of this nature will and have occurred where there has been no previous violence and abuse, or a long-standing relationship between parties... This has previously been used as a defence in non-fatal strangulation assaults, even where victims have openly stated that they did not consent to the assaults and the level of force used during the same.”²⁸
- 3.2 The failure to recognise the risk to life of this kind of violence was apparent in a 2013 case in London.²⁹ In this case, a woman who had accepted a caution for common assault (for striking her male partner) applied for judicial review of the decision of the police to caution her. She had reported her partner strangling her in the course of the incident but he had received no reprimand. She told the police “he had his arms...with his knees on top of my body and I couldn’t move and he strangled me and I couldn’t breathe.” It is recorded by the trial judge that the officer treated the man as the victim because the woman had “slapped him first”. The Judge noted the officer regarded the woman as

²⁸ DOJ Consultation Response 2022.

²⁹ *Caetano v Commissioner of Police of Metropolis* [2013] EWHC 375 (Admin).

the aggressor, and the man the victim. Importantly, the police officer also took the view that pushing the throat was not strangulation.

- 3.3 See also, for example, the recent case of Sophie Moss, killed by Sam Pybus, in which the charge was changed from murder to manslaughter following a 'consent to strangulation' defence being run. In that case, a Home Office pathologist found that the amount of pressure applied to Ms Moss's neck was "towards the lower end of cases which resulted in death... There was no sign of any other violence used or evidence of a fight". That suggests a failure to recognise both the seriousness of the act of strangulation and how injury is often inflicted without external marking.
- 3.4 Our own Court of Appeal in Belfast has shown an awareness of the seriousness and sophistication in its treatment of the issues.³⁰ The Court has provided leadership, which is also now relied upon in Great Britain. The Court observed "Strangulation is an effective and cruel way of asserting dominance and control over a person through the terrifying experience of being starved of oxygen and the very close personal contact with the victim who is rendered helpless at the mercy of the offender. The intention of the offender may be to create a shared understanding that death, should the offender so choose, is only seconds away. The act of strangulation symbolizes an abuser's power and control over the victim, most of whom are female."³¹
- 3.5 The Court of Appeal made clear that the presence or absence of marks is not determinative of very much. It observed "It is a feature of non-fatal strangulation that it leaves few marks immediately afterwards and this paucity and in some cases lack of observable physical injuries to the victim leads to its seriousness not being correctly assessed. Furthermore, in general there is no inevitable commensurate

³⁰ It can be noted that prior to this judgment a number of Judges in Northern Ireland received training from Gael Strack and Casey Gwinn the Hope Alliance and Strangulation Centre.

³¹ *R-v-Campbell Allen* [2020] NICA 25

relationship between signs of injury and the degree of force used. Non-fatal strangulation can lead to physical and psychological problems. For instance it can result in damage to anatomical structures within the neck, such as the muscles, blood vessels, vocal cords, hyoid bone or thyroid gland. Non-fatal strangulation may be a predictor of the future use of lethal force. Studies in both Australia and New Zealand found that strangulation is a significant factor in risk assessment for homicide of women in the domestic context”

3.6 “...We note that the seriousness of strangulation has led to the introduction of legislation in other jurisdictions criminalising the act of strangulation as a stand-alone offence and increased sentencing where it is a feature... In this jurisdiction there is no stand-alone offence but rather section 21 of the Offences against the Person Act 1861 criminalises attempting “to choke, suffocate or strangle ... with intent ... to commit, ... any indictable offence.” Both those representing the prosecution and the appellant in this case recognised that strangulation should be an aggravating feature to be taken into account by courts when imposing sentence. We agree and consider it to be a substantial aggravating factor. We consider that the use of body force to strangle is not less heinous than the use of a weapon. We also emphasise the need to give consideration to that feature when forming a view as to future risks.”³²

3.7 The introduction of a stand-alone offence was based upon research and empirical evidence that has been collected across jurisdictions, which demonstrate the nature and scale of non-fatal strangulation. Various jurisdictions have enacted laws directed at reflecting the seriousness of it - as an offence in its own right - and in preventing homicide. In Northern Ireland, the new offence of Non-Fatal Strangulation came into effect on

³² Ibid.

26 June 2023.³³ That provision followed public consultation and engagement with expert practitioners at home and abroad.³⁴

3.8 Section 21 of the Offences Against the Person Act 1861, makes it an offence to choke, suffocate or strangle another person, but only if it is proved that it was done with the intention of committing an (other) indictable offence. Therefore, where strangulation was a feature of a police report or a case as it progressed through the justice system, it almost always appeared as an assault offence, the only reference to the act of strangulation being in the description of the offence at court. The act of strangulation was not recorded on the face of the charge. The nature and scale of non-fatal strangulation was not captured by the relevant agencies and the seriousness in its own rights or as an indicator of potential homicide was not fully appreciated.

3.9 NFS was being picked up at times, but not routinely or systematically. District Judge McElholm, who received specific training on the issue and began to notice and become active in highlighting the issue in his court, described it as the perpetrator's "weapon of choice". He went on "I would say strangulation cases are definitely on the increase, it's a tactic that's used by abusers more and more. In a lot of cases there is no mark left and it's a way of controlling and instilling fear in the victim." On the legislation prior to amendment he said "charges are very rarely levelled in strangulation cases...At the moment we're reduced to prosecuting them as common assault, maximum sentence six months, and then can only be dealt with in the magistrates' court...That's a very poor situation.

³³ By the Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022.

³⁴ The Department of Justice NI has undertaken focused analysis of domestic and sexual violence and abuse and violence against women. It has responded with a number of measures including a removal of the so-called 'rough-sex' defence and the introduction of a standalone offence of NFS. Both are part of a wider programme of work to tackle all forms of violence and abuse. See in particular Consent to serious harm for sexual gratification not a defence | Department of Justice (justice-ni.gov.uk); Consent to Serious Harm for Sexual Gratification: Summary of responses and way forward | Department of Justice (justice-ni.gov.uk); Consultation on Non-Fatal Strangulation | Department of Justice (justice-ni.gov.uk); Non-Fatal Strangulation Summary of Responses and Way Forward Report | Department of Justice (justice-ni.gov.uk).

I would like to see those cases go to the Crown Court, which has much higher sentencing powers." ³⁵

- 3.10 In other jurisdictions, steps were taken some years ago. For example, in Idaho, in 2005, a Bill was enacted to make non-fatal strangulation a criminal offence, without any requirement to prove intent to kill or injure or proof of any injury. All that is required is proof of the intent and attempt 'to strangle'. The Idaho law, which prompted greater attention to strangulation by, amongst others, police officers and doctors, demonstrated that a stand-alone offence can immediately improve the outcome of law enforcement and save lives.³⁶ A number of jurisdictions have since adopted the same approach.

³⁵ BBC News Online, 1 February 2023.

³⁶ See A Review of 300 attempted strangulation cases Part I, Journal of Emergency Medicine 2001, Strack GB, McClane GE, Hawley D.

4. HOW WIDESPREAD IS NON-FATAL STRANGULATION?

- 4.1 This is a world-wide phenomenon. By November 2020, the United Nations was requiring urgent action to end the “pandemic of femicide and violence against women”. According to United Nations Data, more than half of women who are murdered are murdered by their partner or former partner. A high proportion of those have a history of strangulation by their partner.
- 4.2 Despite the alarmingly high numbers recorded, numerous studies have demonstrated that this is an under-reported form of violence with very few victims even seeking medical attention.³⁷ There is plenty of evidence that indicates its prevalence.³⁸ It seems that the more it is understood and discussed, the greater the prevalence.
- 4.3 The issue has been identified in Great Britain and Northern Ireland. In 2014, Foyle Women’s Aid, following engagement with and training at the Strangulation Centre in California, drew attention to the issue. In 2015, District Judge McElholm, sitting in Derry/Londonderry raised the issue. In 2017, he was again reported to be appalled at the “woefully inadequate” sentencing powers in such cases.³⁹ One issue, which was raised with inspectors from Criminal Justice Inspection Northern Ireland during the fieldwork for their 2019 inspection of the handling of domestic violence and abuse cases, was legislation and sentencing options surrounding choking or strangulation. District Judge McElholm had raised concerns publicly on many occasions about the suitability of (the then) current legislation in cases where the victim reported to police that they have been ‘choked’. As noted throughout, the amendment to the

³⁷ Ibid.

³⁸ As discussed, the prevalence can only be indicated until the offence has been in place for a sufficient length of time allowing records to be collected and there is adequate awareness and support to enable victims to report.

³⁹ Irish Legal News, 25 September 2017. During an inspection by Criminal Justice Inspection NI, Judge McElholm was interviewed.

law is one step in the right direction but not sufficient in and of itself to stop it.

What does the general picture tell us?

- 4.4 The prevalence of NFS, at this early stage, can only be estimated but a reliable starting point (for the reasons explained above) is to look at the nature and scale of domestic and sexual violence and abuse.
- 4.5 From the figures available for Northern Ireland, we know that at least 38 women have been killed by their current or former intimate partners since 2017. The PSNI has also recorded that, between 2008 and 2021, intentional homicide of women by intimate partners increased four-fold.⁴⁰ The rate has risen from 0.11 to 0.52 per 100,000 of the female population. Of 36 police services across the UK, the PSNI recorded the eighth highest rate of femicide per 100,000.⁴¹
- 4.6 In November 2020, a UK Census established that a woman is killed by a man every three days. Of those perpetrators, 53 per cent were known to have histories of abuse and violence against women. In England and Wales, the method of killing in homicide has been recorded for several decades. Fatal strangulation (manual and ligature), choking, suffocation and asphyxia accounts for between one quarter and one third of all intimate partner male-on-female homicide.⁴² That can be seen over the last four decades.⁴³
- 4.7 That strangulation is a gendered form of violence was also the conclusion of a systematic review in the United States. In New York, for example, when strangulation was made a crime in 2011 an article by

⁴⁰ PSNI statistics domestic abuse quarterly report 2022.

⁴¹ Femicide Census 2020.

⁴² Femicide Census 2020. See also Clarification and correction of data referring to Northern Ireland's ranking in respect of Domestic Abuse Homicide rates across Europe 3rd February 2022.

⁴³ See e.g. Susan SM Edwards, *Policing Domestic Violence* (London: Sage, 1989); Sam Bonham and Natalie Ktena, "Change in Strangling Law 'Would Save Lives'" *BBC News* (28 October 2019).

Reuters reported that there were 2,000 arrests made under the new law in the first 15 weeks. The article cited research which indicated that women in abusive relationships who are at some point strangled by their abuser, are 10 times more likely to be killed at some point and that about 10% of violent deaths in the United States each year are due to strangulation, with six female victims to every male. A systematic literature review in 2020 identified 27 empirical, peer-reviewed studies which documented the outcomes of non-fatal strangulation in intimate partner violence and sexual assault. It reported that “almost all victims were female.”⁴⁴ In San Diego for example, of 300 reported instances of strangulation, 298 were women strangled by men.⁴⁵ In a smaller review in the UK, it was recorded that of 70 victims, two were male.⁴⁶

4.8 We know that in the United Kingdom and Ireland, the majority of victims of domestic violence and abuse are women and the majority of perpetrators are men. In Northern Ireland, the PSNI reported that “of all offenders dealt with by police in connection with domestic abuse crimes that result in a sanction outcome, more than four in five are male; in 2021/22 83 per cent were male”.⁴⁷ The majority of relationships between the domestic abuse victim and offender are categorised as current or ex-spouse / partner / girlfriend / boyfriend etc.⁴⁸

4.9 Women’s Aid report that non-fatal strangulation and asphyxiation are a common feature of domestic abuse cases they deal with.⁴⁹ That is unsurprising; strangulation “is a tactic of power and control that is very common in domestic violence scenarios,” says Amy Barasch, executive director of the New York State Office for the Prevention of Domestic

⁴⁴ *The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review*, October 2020, Helen Bichard, Christopher Byrne, Christopher W. N. Saville, and Rudi Coetzer.

⁴⁵ *Neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review*, (2021), Bichard H., Byrne C., Saville C.W.N., Coetzer R.

⁴⁶ White C., Manchester SARC, 2018.

⁴⁷ Trends and Patterns in

⁴⁸ *Ibid.*

⁴⁹ Women’s Aid, ‘Domestic Abuse Bill: Women’s Aid Briefing for Committee Stage’, January 2021.

Violence.⁵⁰ *SafeLives*, a UK Charity which supports those experiencing domestic abuse and trains front line domestic abuse practitioners, has seen the elevated risk and its consequences and has incorporated strangulation and suffocation into its “SafeLives Dash Risk Checklist”⁵¹ for use by Independent Domestic Violence Advocates and non-police agencies.⁵²

4.10 In 2022, in response to a call for evidence, it was noted “There was wide agreement that a gender specific strategy was needed in Northern Ireland.”⁵³ It is also recognised that any approach to violence “needs to address misogyny that has been embedded in society across generations”.⁵⁴ Respondents also noted the “portrayal of women in the media, on television and online, creates gender stereotypes, which can then impact on the attitudes and behaviours of men leading to violence against women and girls; this needs to be addressed.”⁵⁵

4.11 Together with the call for evidence there was a public survey. Of the 411 respondents to that, 41% reported that they had previously been a victim of domestic or sexual abuse, 10% stated that they would prefer not to say and 1% didn’t answer. In terms of respondent profile, the vast majority (86%) identified as being of female gender.⁵⁶

4.12 We also know that deaths have occurred as a result of so-called ‘rough sex going wrong’ defence, where the extreme danger is either not known or recklessly ignored. Strangulation “is a feature of most of the homicides and non-fatal assaults that have involved the use of the rough sex

⁵⁰ Reuters, US News, Neale Gulley, 7 April 2011.

⁵¹ DASH checklist enables an identification of risk when domestic abuse, “honour”-based violence and/or stalking are disclosed.

⁵² SafeLives, “SafeLives Dash Risk Checklist: Quick Start Guidance”

⁵³ Ending Violence against Women and Girls strategy summary report, August 2022

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ending Violence against Women and Girls strategy summary report, August 2022

defence by the perpetrator.”⁵⁷ *We Can't Consent To This* has published 59 examples of women "killed by men who claim a sex game, gone wrong".⁵⁸ It is also becoming increasingly apparent that the 'rough sex defence' is being used to mask murder.⁵⁹ A psychotherapist specialising in sex and relationships observed " It's a silent epidemic... People come to me when they've had 'near misses'; when strangulation or 'choking out' has overstepped the mark, and they were unconscious for a long time...The thing with strangulation is that it's always high-risk, but that's literally the last thing people are thinking about."⁶⁰

4.13 We must be clear about strangulation and what it really is. The injuries and risks associated with it are often invisible, but are very real.

4.14 Women's Aid report that non-fatal strangulation and asphyxiation are a common feature of domestic abuse.⁶¹ From the early 2000s, independent research has identified non-fatal strangulation as "a serious risk factor in the lives of women".⁶² Studies have identified that women are at least 13 times more likely than men to be subjected to non-fatal strangulation. Moreover, it is now accepted "unequivocally that strangulation is one of the most lethal forms of domestic violence. When a victim is strangled, she is at the edge of a homicide. Unconsciousness may occur within seconds and death within minutes..." "To compound the seriousness of non-fatal strangulation, we know that victims under-report

⁵⁷ 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. As recorded by the NIHR in its September 2021 response to the DOJ's consultation.

⁵⁸ WCCTT

⁵⁹ See e.g. the cases of Megan Bills, Grace Millane, Natalie Connolly and Charlotte Teeling, for which there has been significant press coverage.

⁶⁰ Steven Pope in an interview to BBC Radio 5 Live, reported by Alys Harte on 28 November 2019, BBC.

⁶¹ Women's Aid, 'Domestic Abuse Bill: Women's Aid Briefing for Committee Stage', January 2021.

⁶² See for example *Risk Factors for Femicide in Abusive relationships: Results from a Multisite Case Control Study* Campbell J and others, *American Journal of Public Health* (2003) 93.

experiences, and “where there are no visible signs of NFS, a common situation,⁶³ victims may be even less likely to report.”⁶⁴

- 4.15 In the US it was recorded, “We know that a man who strangles a woman once is 800% more likely to later kill her.”⁶⁵ As mentioned above, research highlights that 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. Moreover, 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’.⁶⁶ It has been reported that 67 people in the UK have been killed as a result of violence that has been deemed consensual for sexual gratification under what has been referred to as the rough sex defence.⁶⁷
- 4.16 In 2022, the Executive Office issued a Call for Evidence on a Strategy for Ending Violence against Women and Girls. The majority of respondents agreed that there needs to be robust and accurate data that can be disaggregated; that the scope and scale of the problem is hard to quantify due to vast under-reporting; and that there are multiple victims and victims of multiple incidents.⁶⁸
- 4.17 As the section of the statute that makes non-fatal strangulation a criminal offence was only recently commenced, the relevant agencies such as the PSNI, PPSNI, Court Service and Probation Service have no statistical database to draw from. To date, moreover, the fact of non-fatal strangulation was not routinely recorded by any of the agencies. If it featured in a court judgment or sentence, that was the exception. It is

⁶³ Roberta Dunn, Kunal Sukhija and Richard Lopez, *Strangulation Injuries* (StatPearls Publishing, 2020)

⁶⁴ Michelle Patch, Jocelyn Anderson and Jacquelyn Campbell, “Injuries of Women Surviving Intimate Partner Strangulation and Subsequent Emergency Health Care Seeking: An Integrative Evidence Review” (2017) 44 *Emergency Nurses Association* 384.

⁶⁵ Gwinn C, *ibid* and see *The Lethality Assessment Program Maryland Model 2005*.

⁶⁶ See for example, *We Can't Consent to This* Available at: <https://wecantconsenttothis.uk/actnow>

⁶⁷ House of Commons Public Bill Committee, ‘Evidence for the Public Bill Committee - We Can't Consent To This - Domestic Abuse Bill 2019-21’ (HoC, 2020).

⁶⁸ Summary Report Ending Violence against Women and Girls Call for Evidence August 2022, Executive Office.

not possible to give an accurate estimate of the nature and scale of non-fatal strangulation in Northern Ireland but there is evidence from which to make some reliable working assumptions.

4.18 The evidence that is available from jurisdictions where there is a standalone offence together with the local statistics for domestic and sexual violence and abuse suggest strongly that non-fatal strangulation is *at least as* prevalent in Northern Ireland as elsewhere.

4.19 Domestic violence and abuse are “threatening, controlling, coercive behaviour, violence or abuse (psychological, virtual, physical, verbal, sexual, financial or emotional) inflicted on anyone (irrespective of age, ethnicity, religion, gender, gender identity, sexual orientation or any form of disability) by a current or former intimate partner or family member”.⁶⁹ An incident can occur anywhere; it does not have to be connected to the home. Family members are: mother, father, son, daughter, brother, sister, grandparents, whether directly or indirectly related, in-laws or stepfamily. Intimate partners are those who are or have been in a relationship “with a degree of continuity and stability”. The relationship “must also have had (or reasonably be supposed to have had) a sexual aspect.”⁷⁰

4.20 Between 2009 and 2019, on average, one woman was killed by a man every three days in the UK. A current or former partner of the women was responsible in 62 percent of these killings. And a history of abuse was known in 59 percent of the 1,042 female homicides committed by current or former partners or other male relatives. Data recently published in the report ‘Domestic homicides and suspected victim suicides during the Covid-19 pandemic 2020–2021’ showed that “nearly all victims of intimate partner homicides and victim suicides during this

⁶⁹ As outlined in the 2016 Northern Ireland Government Strategy ‘Stopping Domestic and Sexual Violence and Abuse in Northern Ireland’ and adopted by the PSNI.

⁷⁰ Ibid. and PSNI Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2021/22, PSNI Statistics Branch, 2 December 2022.

period were women, and nearly all suspects were men. The overall number of domestic homicides in the 12 months between 1 April 2020 and 31 March 2021 was 163. There were also 38 suspected suicides of victims of domestic abuse.”⁷¹

- 4.21 The Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 created a new Domestic Abuse Offence, which criminalises a course of abusive behaviour including coercive and controlling behaviour, psychological abuse, emotional abuse, financial abuse and economic abuse. The PSNI began recording this on 21st February 2022.
- 4.22 The prevalence of domestic violence and abuse has increased almost every year since the PSNI began collecting and publishing their data series in 2004/2005.⁷² In 2004/2005, there were 20,959 reported incidents of domestic violence and abuse, of which 9,647 were recorded by the PSNI as domestic motivated crimes.⁷³
- 4.23 By 2007/2008, there were more recorded crimes with a domestic motivation than the combined total of sexual offences, robbery, armed robbery, hijacking, theft or unauthorised taking of a motor vehicle, arson, dangerous driving, handling stolen goods and offences under anti-terrorism legislation. In 2007/2008, where the gender was known, 76% of all adult victims of crimes with a domestic motivation were female.⁷⁴ More than two thirds of all crimes with a domestic motivation were categorised as violent crime.
- 4.24 In 2009/2010, there were recorded 24,248 domestically motivated incidents, of which 9,903 were recorded by PSNI as crimes. There was a known domestic abuse motivation for approximately 1 in every 4

⁷¹ *Police Response to Violence against Women and Girls Final Inspection Report, September 2021*, Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services

⁷² Note, however, there is a clear disparity between reports and actual incidents which is explored further. The statistics were not disaggregated at this stage.

⁷³ Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2021/22, PSNI Statistics Branch, 2 December 2022.

⁷⁴ Thematic Review of Domestic Abuse, NI Policing Board, June 2009.

recorded murders, manslaughters and attempted murders and 1 in 5 recorded rapes or attempted rapes.

- 4.25 In 2017/2018, the PSNI recorded the highest level of domestic abuse incidents and crimes since the data series began in 2004/2005. The 29,913 domestic abuse incidents reported to the PSNI equated to one reported domestic abuse incident approximately every 17 minutes of every day. Of those incidents 14,560 were recorded as domestic crimes. Of those crimes, just under three quarters were recorded as violence against the person. In the same year, there were 23 murders in total in Northern Ireland, of which 11 occurred in a domestic context.⁷⁵ Over the 10 years 2007/2008 to 2017/2018, there was an average of six domestic homicides per year.
- 4.26 The Northern Ireland Crime Survey recorded at least one in 25 adults experienced domestic abuse between 2014/2015 and 2017/2018.⁷⁶
- 4.27 2018/2019 was another year in which the figures for domestic abuse incidents and crimes exceeded previous years.⁷⁷ Domestic abuse crimes showed an increase of 11.4% in just 12 months. By this stage, domestic abuse crimes represented 16% of all police recorded crime. Domestic abuse makes up 18% of all recorded crime in England and Wales.⁷⁸
- 4.28 2021/2022 was another record-breaking year, with the highest number of domestic motivated crimes since 2004/2005. There were 33,186 incidents and 21,723⁷⁹ crimes. Just under 70% of perpetrators of

⁷⁵ Four of which related to one family.

⁷⁶ Campbell, P and Rice, A., Department of Justice Analytical Services Group, Experience of Domestic Violence: Findings from the 2011- 12 to the 2015-16 Northern Ireland Crime Surveys, Research and Statistical Bulletin 17/2017, June 2017

⁷⁷ PSNI, Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland, Update to 31 March 2019: https://www.psni.police.uk/globalassets/inside-thepsni/our-statistics/domestic-abuse-statistics/2018-19/q4/domestic-abuse-bulletin-mar-_19.pdf

⁷⁸ *Violence against Women and Girls, (2022)* National Police Chiefs Council

⁷⁹ an increase of 2,698 (14.2%) on the previous 12 months and two and a quarter times higher than when records began in 2004/05.

domestic abuse were male, however this increased to 86% for repeat perpetrators.⁸⁰ There were nine homicides with a domestic abuse motivation.⁸¹ For the rolling 12 months to 30 September 2022, the PSNI recorded 33,108 domestic abuse incidents in Northern Ireland.⁸² The number of domestic abuse crimes rose to 22,288,⁸³ again exceeding the highest number recorded since 2004/2005. There were 17 domestic abuse incidents and 12 domestic abuse crimes per 1,000 of the population. Crimes with a domestic abuse motivation represented 20.4 per cent of all crimes recorded by the police in 2021/2022, compared with 8.3 per cent in 2004/05.

4.29 In the 12 months from 1st April 2022 to 31st March 2023, there were 32,875 domestic abuse incidents and 22,343 crimes. That represented 17 domestic abuse incidents and 12 domestic abuse crimes per 1,000 population. Eight policing districts showed an increase in the number of domestic abuse crimes. There were eight homicides of women recorded with a domestic abuse motivation.⁸⁴

4.30 As shown above, women and girls in Northern Ireland are disproportionately affected by violence, abuse and intimidation. According to the PSNI, “From April 2021 to March 2022, in Northern Ireland, they made up 78% of all victims of sexual crimes, 68% of domestic abuse, 64% of harassment and as of April 2022, 95% of stalking crimes.”⁸⁵ Worryingly, the sanction outcome rate for domestic abuse crimes has been falling (from 46.5% in 2010/11 to 26.3% in 2019/20). The sanction outcome rate in 2021/2022 was 27.6%. The number of rape offences has also increased with the highest level (372) recorded in 2021/2022. Levels of indecent/sexual assault offences on

⁸⁰ Domestic Abuse Incidents and Crime Recorded in Northern Ireland, Monthly Update to 31 March 2022, PSNI.

⁸¹ Domestic Abuse Incidents and Crime Recorded in Northern Ireland, Monthly Update to 31 March 2022, PSNI

⁸² an increase of 1,667 (5.3 %) on the previous 12 months.

⁸³ an increase of 2,063 (10.2 %) on the previous 12 months.

⁸⁴ Domestic Abuse Incidents and Crime Recorded in Northern Ireland, Monthly Update to 31 March 2023, PSNI

⁸⁵ PSNI TVAWG Action Plan September 2022.

males and females have also shown increasing trends, with the highest level for both female victims (292 offences) and for male victims (76 offences) seen in 2021/2022.

- 4.31 Violence against women is believed to intensify or increase in the aftermath of conflict.⁸⁶
- 4.32 In Northern Ireland, research has focused on domestic violence and conflict. Various studies have made the connection between conflict and an increase in the scale and nature of domestic violence. For example, research has found that the conflict in Northern Ireland affected both the nature of relationships and the nature of the violence experienced by women in their homes. The conflict also influenced people's ability to access the police.⁸⁷ Aisling Swaine notes "Access to, and the presence of, a functioning legal and policing system is often impossible during times of conflict. In Northern Ireland, while a functioning criminal legal and policing system existed, access to the police for ordinary crime was difficult".⁸⁸
- 4.33 In Northern Ireland, over the last few years, there has been increasing focus on practical measures to tackle violence against women and girls. For example, on 27 September 2022, the PSNI launched its first Tackling Violence against Women and Girls Action Plan for Policing.⁸⁹ In launching the plan, Chief Constable Simon Byrne made clear the PSNI's recognition of the issue and its commitment to tackling it. He said "We cannot ignore the lived experiences of so many female victims. Harassment, intimidation, violence and abuse is a violation of human dignity." It was recorded that "Women and girls in Northern Ireland are

⁸⁶ Research is abundant and compelling but sufficient empirical evidence is not available. For a concise and scholarly assessment of the issue and of the earlier literature, see *Conflict-Related Violence Against Women – Transforming Transition*, Aisling Swaine 2018.

⁸⁷ See e.g. *Police Response to Wife Assault in Northern Ireland*, Pamela Montgomery, *Violence and Victims* 6, No. 1 (1991), p. 51.

⁸⁸ The seminal work *Conflict-Related Violence against Women Transforming Transition*, Aisling Swaine 2018.

⁸⁹ PSNI 26 September 2022.

disproportionately affected by violence, abuse and intimidation. From April 2021 to March 2022, in Northern Ireland, they made up 78% of all victims of sexual crimes, 68% of domestic abuse, 64% of harassment and as of April 2022, 95% of all stalking crimes”.⁹⁰ Moreover, in the previous 5 years 34 women and girls across Northern Ireland were killed by men.

4.34 In respect of strangulation under the Offences against the Person Act 1861, the figures available from the Public Prosecution Service of Northern Ireland show that from 2002 to December 2019, there were 502 suspects charged by PSNI with choking/strangulation but only 20 prosecutions for that offence.⁹¹

4.35 In New York, when in 2011 a new law was introduced making non-fatal strangulation a stand-alone offence, it was reported shortly thereafter that “strangulation, common in domestic abuse cases, is now a crime in New York and already 2,000 people have been arrested under the weeks-old law... The 2,000 arrests on choking charges in the first 15 weeks since the law took effect are absolutely unprecedented and staggering.”⁹² It concluded “About 10 percent of violent deaths in the United States each year are due to strangulation, with six female victims to every male, according to data from the New York Prosecutors Training Institute. Advocates against domestic violence, including Barasch, often say only about half of such incidents are ever reported to police.”⁹³

4.36 In a systematic review in the United States, in 2021, it was noted again that strangulation is a highly-gendered act. For example, as mentioned above,⁹⁴ in San Diego, of 300 reported instances of strangulation 298 were women strangled by men.⁹⁵ If one takes the example of San Diego,

⁹⁰ Importantly, this is likely to reflect the under-reporting and represent only a fraction of the incidents.

⁹¹ Statistical Bulletin PPP

⁹² Sean Byrne, acting commissioner for the state’s Division of Criminal Justice Services

⁹³ Ibid.

⁹⁴ At paragraph 4.7.

⁹⁵ *Neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review*, (2021), Richard H., Byrne C., Saville C.W.N., Coetzer R.

women were the victims of men in 99.3% strangulation cases.⁹⁶ It was found that up to 10% of the population had experienced strangulation.⁹⁷ A range of studies confirmed that whilst lifetime incidence of strangulation is up to 10%, this rises to 50-68% for victims of recurrent abuse. Studies of intimate partner violence and sexual assaults where medical examinations took place have found that strangulation was involved in approximately 20-25% of cases.⁹⁸ In a similar analysis of the UK, it was recorded that only two out of 70 victims were male.⁹⁹ In a population of 1.9 million people in Northern Ireland, 10% translates into a 'best guess' of 190,000 people strangled.¹⁰⁰

4.37 In Manchester, interviews with 204 women attending an NHS Sexual Assault Referral Centre revealed that 42 per cent had reported non-fatal strangulation by a partner or former partner.¹⁰¹ Another study found that of 481 respondents who had experienced domestic abuse, approximately 95 per cent had been strangled by their partner.¹⁰² In a recent BBC survey of over 2,000 participants, 38% of women under 40 had experienced strangulation during sex, with 42% of those saying it was unwanted, and they had felt pressured, coerced or forced.¹⁰³

⁹⁶ See *A Review of 300 attempted strangulation cases Part I*, Journal of Emergency Medicine 2001, Strack GB, McClane GE, Hawley D.

⁹⁷ Ibid.

⁹⁸ *The Neuropsychological Outcomes of Non-fatal Strangulation in Domestic and Sexual Violence: A Systematic Review*, Helen Bichard, Christopher Byrne, Christopher W.N. Saville, Coetzer (2021). It also referred to forensic reports from San Diego in 300 cases, in 298 of which women were the victims and men the perpetrators.

⁹⁹ White C., Manchester SARC, 2018.

¹⁰⁰ *The Neuropsychological Outcomes of Non-fatal Strangulation in Domestic and Sexual Violence: A Systematic Review*, Helen Bichard, Christopher Byrne, Christopher W.N. Saville, Coetzer (2021). It also referred to forensic reports from San Diego in 300 cases, in 298 of which women were the victims and men the perpetrators.

¹⁰¹ Research by Dr Catherine White, Clinical Director, St Mary's Sexual Assault Referral Centre, St Mary's Hospital cited in Centre for Women's Justice, "CWJ submission to Domestic Abuse Bill Committee 21 May 2020" (21 May 2020)

¹⁰² Jane Monckton Smith, "Non-fatal Strangulation: A Summary Report on Data Collected from SUTDA Survey" (University of Gloucestershire).

¹⁰³ BBC 5 Live Women's Poll, Savanta ComRes. 2,002 UK women aged 18-39 were interviewed online between 14th-16th November 2019. Data were weighted to be representative of all UK women by age and region.

- 4.38 In June 2020, a survey conducted by Stand up to Domestic Abuse into the effects of non-fatal strangulation was published.¹⁰⁴ That study found in nearly 70% of cases non-fatal strangulation was used on more than one occasion, which “suggests that NFS is part of a pattern used by some perpetrators. This data suggests NFS is not a single spontaneous assault that is never repeated in most cases”.¹⁰⁵ This study also found that “in over 90% of cases the perpetrator was an intimate partner... In nearly 60% of cases the assault was not reported. This is not unexpected as the context in which NFS is happening is domestic abuse, and most domestic abuse is not reported. It is interesting that in just over 40% of cases there was a report.”¹⁰⁶ The survey conclusion also made it clear that “Even NFS in a sexual context is still without consent and in a wider context of domestic abuse”.
- 4.39 The offence of non-fatal strangulation has been in force in England and Wales since June 2022. Because the law has been enacted and made operational, there is now some empirical evidence of the prevalence of non-fatal strangulation. This is only helpful as an early indicator - it is far from comprehensive – but it gives some insight into the nature and scale of the issue across the UK. The Crown Prosecution Service analysed a sample of 32 cases involving non-fatal strangulation offences. The findings are stark. They reveal that in 38% of cases there was a child present and in some cases that child was in the same room when the offence was occurring. In 69% of the cases, the perpetrator was the victim’s partner and in 13% the perpetrator was an ex-partner. In 72% of cases, suspects were also charged with assault and in 13% of cases, they were also charged with threats to kill.¹⁰⁷ The Domestic Abuse lead for the CPS noted “This type of offending doesn’t often happen in isolation, suspects may show aggression and violence, regularly leaving victims with serious physical injuries and psychological trauma.”

¹⁰⁴ *Non-Fatal Strangulation A summary report on data collected from SUTDA survey*, Dr Jane Monckton Smith, University of Gloucestershire, June 2020.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ See *CPS News Sexual Offences* 2 December 2022.

- 4.40 It is impossible to assess the scale of the issue in Northern Ireland as the data is not, yet, collected. Following the commencement of the new offence, all relevant agencies should now be able to collect the necessary data. That should include: reports; incidents; crimes; arrests; charges; prosecutions; convictions; and, sentencing. The data should be disaggregated according to: setting; scenario; other offences reported; gender of victim and perpetrator; age of victim and perpetrator; location of offence.
- 4.41 Of the victims I spoke with two thirds had experienced strangulation at the hands of their partner or former partner.
- 4.42 As far back as 2001, as part of research into traumatic brain injuries, it was reported that “strangulation has emerged as a “hidden epidemic””.¹⁰⁸ In a UK audit it was noted there was strangulation recorded in one in five cases presenting at a sexual assault referral centre.¹⁰⁹ They observe “for incidence to be so high versus lifetime prevalence is suggestive of repeated injuries and, indeed, the literature confirms this, with studies showing half of survivors reporting being strangled between three and 20 times.”¹¹⁰
- 4.43 While the number of incidents reported of violence and abuse is significant, domestic abuse is the least likely of all violent crimes to be reported to the police. Research shows that even when an incident is reported, the extent of the abuse is under-reported. By the very nature of domestic abuse, the reasons for under-reporting are varied and complex. Part of the problem is public perception. While the PSNI is unable single-handedly to address that, media campaigns (which stress that all incidents will be taken seriously and that privacy will be protected) will help.

¹⁰⁸ Taliaferro, Mills & Walker, 2001, p.294

¹⁰⁹ White C., 2018.

¹¹⁰ Referring to e.g. Vella, 2013; Wilbur et al., 2001

What does this mean?

4.44 Almost certainly, hundreds of thousands of women are unprotected and at risk of homicide. Northern Ireland is likely to have at least 10% of its population at risk but with its history of conflict-related violence it is entirely possible that Northern Ireland fares worse than comparable regions. Yet, as seen elsewhere, in respect of strangulation under the Offences against the Person Act 1861, in NI there were only 502 suspects charged by PSNI with choking/strangulation and 20 prosecutions for that offence.¹¹¹ This reflects, almost certainly, the inadequacy in the law prior to introduction the new offence rather than the incidence of NFS.

¹¹¹ Statistical Bulletin PPP

5. THE DUTY TO PROTECT AGAINST NON-FATAL STRANGULATION

- 5.1 There is a legal duty on the State, through legislation and practical measures, to protect against non-fatal strangulation. That is not limited to, but begins with, enacting legislation. It extends to investigating and prosecuting NFS and to implementing practical measures of prevention and support. To understand the extent of the duty and reinforce the legal requirement for action, it is worth setting out the law in some detail.
- 5.2 The State does not dispute that it has a positive obligation to enact criminal law provisions to effectively punish domestic and sexual violence and to apply them in practice through effective investigation and prosecution. The extent of the obligation and the measures required to discharge it may vary. The duty means, as a starting point, three things: (i) consent to serious harm cannot be a lawful defence; (ii) there must be proper medical examination and a police investigation to establish harm in cases of non-fatal strangulation; (iii) violence inflicted through non-fatal strangulation must be punished as a serious form of violence. The duty goes beyond merely legislating.
- 5.3 The following is an overview of: the most relevant legal provisions; the duty bearers; the rights holders; the scope of the duty; and, the operational consequences of the duty to protect against NFS.
- 5.4 ***The Human Rights Act 1998*** requires *all* public authorities to act in a manner that is compatible with the rights contained in the European Convention on Human Rights and Fundamental Freedoms (ECHR), as annexed to the Act.¹¹² The ECHR sets out the minimum that is expected of the State but it is a living treaty and is interpreted in line with developments in societal attitudes and in medical evidence of harm.

¹¹² Human Rights Act 1998 section 6.

- 5.5 The relevant duty bearers include, to name a few: the Executive; the Department of Justice; the Department of Health; Local Councils; the Department of Education (and state-regulated/maintained schools and colleges); the PSNI;¹¹³ the Policing Board; the Public Prosecution Service (PPS); the Court Service (NICTS); the Prison Service; the Police Ombudsman; the Probation Board (PBNI); health and social care providers; regulation and quality improvement agencies; and, policing and criminal justice inspectors.¹¹⁴ These duty bearers must be equipped to discharge their duties. Not least, they must be provided with the requisite resources and effective training, which recognise the high risk to public safety.¹¹⁵
- 5.6 The most relevant duties arise under ECHR Articles 2, 3, 8 and 14.¹¹⁶
- 5.7 **Article 14 ECHR** ensures that everyone enjoys their ECHR rights without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Articles 2, 3 and 8 therefore must be enjoyed equally by women. Yet, the research is unambiguous – women and girls are disproportionately affected by domestic and sexual violence and abuse, including by non-fatal strangulation. According to the World Health Organisation, in 2019, more than one in three women are victims of intimate partner violence.¹¹⁷

¹¹³ The general functions of the police mirror their obligations under the Human Rights Act. By section 32 of the Police Act it is provided that police must: protect life and property; preserve order; prevent the commission of offences; and, where an offence has been committed, to take measures to bring the offender to justice.

¹¹⁴ *Ibid.* A public authority includes a court or tribunal, and any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament. In relation to a particular act, a person is not a public authority only if the nature of the act is private. “An act” includes a failure to act but does not include a failure to introduce in, or lay before, Parliament a proposal for legislation; or make any primary legislation or remedial order.

¹¹⁵ See e.g. *Simsek v Turkey* (2018) Application no. 48719/08.

¹¹⁶ For the purposes of future actions and enactments, there is an important safeguard. Existing human rights and their protection are guaranteed because the 1998 Act is intended to enhance existing rights at a domestic level, not to diminish rights. Section 11 of the 1998 Act provides that a person’s reliance on an ECHR right does not restrict: any other right or freedom conferred by or under any law having effect in any part of the United Kingdom; or the right to make any claim or bring any proceedings.

¹¹⁷ WHO 2019, IPV.

While the offence applies regardless of the sex or gender or other characteristic of the victim or perpetrator, more is required to address the imbalance. In other words, having an offence that applies equally does not, without more, correct the unequal impact.

5.8 **Article 2 ECHR** protects the right to life. It requires that everyone's right to life is protected by law. No one may be deprived of his or her life intentionally. If a life is taken, it is not regarded as inflicted in contravention of Article 2 if, but only if, it results from the use of force which is no more than absolutely necessary. Furthermore, the use of force that is permitted is limited: in defence of a person from unlawful violence; to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection. The use of force must be strictly proportionate to achieving a clear lawful purpose. In other words, no other action, short of using lethal force, could have achieved that lawful purpose. Additionally, any security or police operation must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to legal force.¹¹⁸

5.9 A number of cases in the domestic courts and in the European Court of Human Rights have made manifest the obligation on the State to take appropriate steps to safeguard the lives of those within its jurisdiction. All public authorities must take reasonable steps when they know of, or ought to have known of, real and immediate threats to life. The State has a responsibility to protect individuals from violence by third parties. In its Recommendation on the protection of women against violence, the Committee of Ministers of the Council of Europe recommended, among other things, that member States should "have an obligation to exercise due diligence to prevent, investigate and punish acts of violence,

¹¹⁸ For example *McCann v. United Kingdom* (1995) 21 E.H.R.R. 97.

whether those acts are perpetrated by the state or private persons, and provide protection to victims”.¹¹⁹

5.10 **Article 3 ECHR** guarantees freedom from torture, cruel, inhuman or degrading treatment and punishment. Article 3 ECHR is an absolute right, which means it must never be interfered with under any circumstances. Article 2 and 3 both require that if life is taken or a person is subjected to torture etc. there must follow an effective investigation. To be effective the investigation must be adequate i.e., it must be capable of leading to a determination of what happened and of identifying and – if appropriate – punishing those responsible. Failing to follow an obvious line of inquiry for example would undermine to a decisive extent the investigation’s ability to establish the circumstances of the case and the identity of those responsible. The investigators must take whatever reasonable steps they can to secure the evidence concerning the incident, including, amongst other things, eyewitness testimony.

5.11 In one case, a woman alleged that the investigation into her criminal complaint of domestic violence had not been effective. The Court held that the manner in which the investigation had been conducted had not afforded her the effective protection required by Article 3 ECHR. It observed in particular that, when making the first of her complaints, the applicant had requested assistance and protection for herself and her daughter. It observed “Whenever there are any doubts about the occurrence of domestic violence or violence against women, special diligence is required of the authorities to deal with the specific nature of the violence in the course of the domestic proceedings”.

5.12 In this case, despite the fact that the statutory framework provided for cooperation and for non-judicial measures to identify and ensure action was taken in respect of domestic violence, and although the medical

¹¹⁹ (2002)5 of 30 April 2002

certificate provided prima facie evidence of the applicant's allegations, the authorities failed to use what was available to them.¹²⁰ Where a person suffers strangulation that is not investigated properly that will be covered by the principle in that case. There has not yet been a case specifically on NFS but there can be no doubt that the principle is exactly the same – NFS is a form of violence and abuse.

5.13 **Article 8 ECHR** is also engaged because violence and abuse undermines the bodily integrity aspect of the right to respect for private life. States therefore have a duty to protect the physical and moral integrity of individuals. It is a qualified right, which means restrictions on enjoyment of the right are allowed but only if they are in accordance with the law and are necessary in a democratic society for the protection of one of the stated objectives such as for the prevention of disorder or crime and the protection of the rights and freedoms of others.¹²¹ It has been 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.

5.14 The European Court of Human Rights has held that breach of the obligation to safeguard physical integrity under Article 8 ECHR requires an effective criminal investigation. Not least because effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions. The courts have considered several cases in which the State was criticised over the lack of appropriate legislation or adequate investigations addressing violence against women.

5.15 In one case, a woman alleged that despite her attempts to have allegations of violence and threats investigated, the authorities had failed to ensure her protection. The Court held that there had been a violation

¹²⁰ EM v Romania (2012) ECHR 400.

¹²¹ Article 8(2) ECHR.

of Article 8 ECHR on account of the failure by the Croatian authorities to adequately protect her and the manner in which the national criminal law mechanisms had (or had not) been implemented, contrary to the State's positive obligations.¹²²

5.16 In another case, a woman was attacked with acid for which she believed her former husband had been responsible.¹²³ There was a history of domestic violence, but that had not been reported to the police. The ECtHR found that had the Albanian authorities been aware of the domestic violence they would have been obliged to take measures to protect her from the acid attack. In any event, they were obliged to conduct a prompt and effective investigation - for the identification, prosecution and punishment of her assailant – which they had failed to do. The Court 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.

5.17 In one case, a girl aged 14 (which was the age of consent for sexual intercourse in Bulgaria), was raped by two men. However, the authorities could not prosecute because they could not establish that she had resisted or called for help. The State was found to be in breach of its positive obligation to effectively investigate, punish and prosecute the rape. It was observed that “any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations...requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.”

¹²² *Janković v. Croatia* (2008) ECHR 24. One of the criticisms was that the authorities had delayed in bringing a prosecution.

¹²³ *Tërshana v. Albania* 4 August 2020, App. No. 48756/14.

- 5.18 The court noted, in particular, the universal trend towards recognising lack of consent as the essential element in determining rape and sexual abuse and stressed that States had an obligation to prosecute *any* non-consensual sexual act, even where the victim had not resisted physically.¹²⁴
- 5.19 Trial proceedings will almost certainly be ruled as incompatible with Articles 2 and 3 ECHR if the defence of consent to serious harm for sexual gratification is used, as consent cannot be provided in cases of serious harm or worse. The ECtHR stated: “while in practice it may sometimes be difficult to prove lack of consent in the absence of “direct” proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent.”¹²⁵
- 5.20 This must be good in law *and* in practice. In Northern Ireland, judges relied on a court judgment in which five men were convicted on various counts including assault causing actual bodily harm and wounding. Those offences were contained in the Offences against the Person Act of 1861.¹²⁶ The injuries had occurred during consensual sadomasochistic activities. That case determined that victims’ consent to serious harm for sexual gratification cannot be a defence and cannot serve as a defence where the sexual activity resulted in a victim’s death. The court explained that defence of consent can only be raised “where the activity in question constitutes good reason, is legal and the degree of harm inflicted does not involve actual bodily harm or more serious harm.”¹²⁷

¹²⁴ *MC v Bulgaria* (2003), ECHR 646.

¹²⁵ *MC v Bulgaria* (2003), ECHR 646 at para 181.

¹²⁶ *R v Brown* (1993) UKHL 19.

¹²⁷ *R v Brown* (1993) UKHL 19.

- 5.21 Despite the precedent set by that case, the defence continued to be used even in cases where the victim had died. Moreover, that precedent has been undermined in the force of its application by subsequent cases, focused on consensual violence in sadomasochism. This has led to some perpetrators serving lesser sentences.
- 5.22 It is critically important that this is addressed, even with the removal of the statutory defence, particularly as the use of non-fatal strangulation appears to be increasing. The Centre for Women's Justice has reported that there is "growing pressure on young women to consent to violent, dangerous and demeaning acts". It believes "This is likely to be due to the widespread availability, normalisation and use of extreme pornography."¹²⁸ Adina Claire, Acting Co-Chief Executive of Women's Aid, also noted "how frequently sexual violence is being experienced by women under 40, with partners they consent to have sex with going on to humiliate or frighten them." She reminded that "consenting to have sex with someone does not lessen the seriousness of slapping or choking someone."¹²⁹
- 5.23 There has been a number of cases in Northern Ireland where the defence has been used. In some the defence has been successful in reducing the seriousness of the offence and reducing the sentence.
- 5.24 In the case of Janet O'Donaghue from Armagh, for example, who was strangled and killed by her partner in 1997, the perpetrator claimed she died accidentally in what was then described by the Judge as "deviant sexual behaviour". The Judge accepted that her partner did not intend to cause her death so he received a five-year sentence.¹³⁰ Ms. O'Donaghue was found dead by her daughter with a bootlace around

¹²⁸ Alys Harte, BBC Radio 5 Live Investigations Unit, 28 November 2019, BBC News.

¹²⁹ Ibid.

¹³⁰ We Can't Consent to This, 'Northern Ireland Consultation on Changing the Law on 'Rough Sex' Defences' (We Can't Consent to This, 2020).

her neck, after the perpetrator, Mr. Porter, had left her there without trying to save her.¹³¹

5.25 In another case, in 2017, Gary Doak was accused of false imprisonment, rape, sexual assault and assault occasioning actual bodily harm after an escort he invited alleged she had to fight for her life as he tried to strangle her. On Mr Doak's behalf, at a bail hearing, his counsel contended that the marks on him were consistent with defensive wounds. It was also suggested that there "may be issues of bondage and rough sex, but that's a personal matter for Mr Doak, It's not illegal."¹³² In the Doak case Mr Justice Colton, however, did understand the seriousness of the issue and the risk posed. In denying bail he said "I have a concern that this is someone who could re-offend, with very serious consequences, against a female."

5.26 At least 67 people in the UK have been killed as a result of violence that has been deemed consensual for sexual gratification under what has been referred to as the rough sex defence.¹³³ The use of the defence disproportionately affects women and girls. It is recorded that 60 of those 67 killed in the UK and three killed in Northern Ireland where the defence has been used were women and girls and all suspects in these killings were male.¹³⁴ In Northern Ireland it is clear that the use of the defence, which enabled the perpetrator to negotiate and receive lesser charges or a lighter sentence, was a persistent issue until the defence was expressly removed.¹³⁵

5.27 *There are **other international treaties*** that, for completeness, must be considered. Despite the failure of the UK to incorporate, they must still be taken into account. Not least because, since 1974, the courts have

¹³¹ As reported in the Irish Times, 15 September 1998.

¹³² As reported Belfast Live 21 June 2017, Alan Erwin.

¹³³ House of Commons Public Bill Committee, 'Evidence for the Public Bill Committee - We Can't Consent To This - Domestic Abuse Bill 2019-21' (HoC 2020).

¹³⁴ We Can't Consent To This, 'Women and Girls from Northern Ireland'.

¹³⁵ Discussions in confidence with practitioners.

been prepared to take into account the provisions of unincorporated international treaties in the course of interpreting and applying domestic statutes.

5.28 Cases which considered the impact of the unincorporated ECHR (i.e., cases pre-dating October 2000) held that the ECHR was a legitimate source of enabling courts to decide issues of public policy.¹³⁶ Since incorporation of the ECHR, domestic jurisprudence has demonstrated the increasing importance of unincorporated treaties on the development of the domestic law by supplementing or augmenting ECHR rights, albeit with some important limitations.¹³⁷

5.29 International law has long been used to resolve legislative ambiguity. Therefore, if there is a provision in a domestic statute which may either conflict with or conform to a treaty right, Parliament will be presumed to have intended to conform rather than conflict and the domestic statute will be interpreted accordingly. There is a strong presumption in favour of interpreting domestic statutory law in a way which does not place a member state in breach of its international law obligations.¹³⁸ To explain it another way, the words of a United Kingdom statute, passed after the date of a treaty and dealing with the same subject-matter, should be construed as intended to carry out the treaty obligation and not to be inconsistent with it.¹³⁹

5.30 That principle applies to primary and secondary legislation.¹⁴⁰ Because, if the signing and ratifying of an international treaty does not create any obligation unless and until incorporated directly into domestic law the

¹³⁶ *Blathwayt v Lord Cawley* [1976] AC 397, Lord Wilberforce at p. 426

¹³⁷ See the Human Rights Act 1998 and e.g. *A v The Home Secretary* [2005] AC 68 as to article 14 ECHR in which their Lordships considered the provisions of the unincorporated International Covenant on Civil and Political Rights (the ICCPR).

¹³⁸ *R v Lyons* [2002] UKHL 44 as per Lord Hoffman.

¹³⁹ Lord Bingham *A v Secretary of State for the Home Department (No2)* [2005] UKHL 71; see also *Assange v the Swedish Prosecution Authority* [2012] UKSC 22.

¹⁴⁰ *R v Secretary of State for the Home department, ex p Brind* [1991] 1 AC 696, at para 760G.

international treaty is meaningless and suggests the commitment of the State Party would be a hollow one.¹⁴¹

- 5.31 The United Nations human rights framework requires States to guarantee equal rights and the equal protection of laws. The International Covenant on Civil and Political Rights (ICCPR), expands on those principles and protect an individual's right to life and freedom from inhuman and degrading treatment, respectively. Importantly, Article 2 ICCPR requires that states have sufficient legislative, judicial and other measures to ensure that a remedy is available in the event of treaty violations.
- 5.32 The United Nations has also issued standards and guidelines specific to law enforcement. The UN Code of Conduct for Law Enforcement Officials provides that "Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession." Police officers must in the performance of their duty, respect and protect human dignity and maintain and uphold the human rights of all persons.
- 5.33 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power lays down standards for the treatment of victims. They cover for example: access to justice and fair treatment; restitution; and compensation. Importantly, they apply to all victims and a person may be considered a victim, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.
- 5.34 Victim includes, where appropriate, the immediate family or dependants and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Victims must be treated with

¹⁴¹ Ibid. Lord Bingham in *A v Secretary of State*.

compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

5.35 The UN Committee on the Elimination of Discrimination against Women (UN CEDAW Committee) and the UN Committee against Torture (UN CAT Committee) have highlighted gender-based violence as a persistent issue in the UK, including Northern Ireland.¹⁴² Both UN Committees have also highlighted the disproportionate impact on women and the need for gender sensitive policies to provide protection, prosecution and redress.¹⁴³ Article 1 of the UN CEDAW ensures that gender-based violence against women constitutes discrimination against women and therefore engages all obligations under the Convention.¹⁴⁴ Article 2 UN CEDAW provides that the overarching obligation of States parties is to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women.¹⁴⁵

5.36 Under the UN CEDAW, the Northern Ireland Executive is responsible for acts or omissions of its organs and agents that constitute gender based violence against women, which include the acts or omissions of officials

¹⁴² 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.

¹⁴³ 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.

¹⁴⁴ Article 1, UN CEDAW. Ratified by the UK 1986.

¹⁴⁵ Article 2, UN CEDAW. Ratified by the UK 1986.

in its executive, legislative and judicial branches.¹⁴⁶ Article 2(d) of the UN CEDAW provides that the Northern Ireland Executive, and its organs and agents, are to refrain from engaging in any act or practice of direct or indirect discrimination against women and ensure that public authorities and institutions act in conformity with that obligation.¹⁴⁷

5.37 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)”.¹⁴⁸ The UN CEDAW Committee also made specific reference to the need to ensure that the UK’s “laws and policies effectively protect women with disabilities from all forms of gender-based violence, and in particular violence perpetrated by their caregivers”.¹⁴⁹

5.38 The UN CAT Committee, in its 2019 Concluding Observations on the UK, raised concerns of sexual and gender-based violence. 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. 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.¹⁵⁰

¹⁴⁶ CEDAW/C/GC/35, ‘UN CEDAW Committee General Recommendation No 35: Gender-based Violence against Women’, 26 July 2017.

¹⁴⁷ Article 2(d), UN CEDAW. Ratified by the UK 1986.

¹⁴⁸ CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report’, 8 March 2019, at para 29.

¹⁴⁹ CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report’, 8 March 2019, at para 29(b).

¹⁵⁰ 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.

- 5.39 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. Article 35 of the Istanbul Convention provides that state parties must take the necessary legislative or other measures required to ensure that the intentional commission of physical violence against another person is criminalised.
- 5.40 Article 36 of the Istanbul Convention relates to sexual violence, including rape. It requires that State parties must take the necessary legislative or other measures to ensure that certain intentional conduct is criminalised. Importantly, consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances. 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. Article 45 ensures that the offences are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness.
- 5.41 The UN CEDAW Committee within its General Recommendation No 35 on gender-based violence against women, regarding preventative measures, recommended that States should "provide mandatory, recurrent and effective capacity-building, education and training for members of the judiciary, lawyers and law enforcement officers".¹⁵¹
- 5.42 The Gillen Review Report also made recommendations concerning training and education. Recommendation 4 of the Gillen Review Report

¹⁵¹ CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender-based Violence against Women', 26 July 2017 at para 30(e).

states that “measures should be introduced at the outset of the trial to combat rape myths for example, jury educational material, a short video and written judicial directions. In the wider context, there is a need for an extensive public awareness and school education campaign”.¹⁵² Education on healthy relationships and prevention of gender-based violence requires a cross-departmental approach.

5.43 The UN CEDAW Committee has made several recommendations on mandatory, standardised reproductive and sexual education in NI. In its 2019 concluding observations, the UN CEDAW Committee recommended the UK Government and NI Executive to: take measures to introduce into school curricula mandatory, age - appropriate education on sexual and reproductive rights, including issues such as gender relations and responsible sexual behaviour, throughout the State party.¹⁵³

5.44 The Gillen Review into the law and procedures in serious sexual offences in Northern Ireland is important to recall in this context. Relevant recommendations include Recommendation 6, which requires “a more robust judicial attitude and case management approach to prevent improper cross-examination about previous sexual history”.¹⁵⁴ Also Recommendation 9, which requires “amendments to the Sexual Offences (Northern Ireland) Order 2008 to ensure juries do not bring sexual stereotypes into play and to impose a discernible shift towards a measure of affirmative expression of consent”.¹⁵⁵

5.45 Within the UN CEDAW Committee’s Inquiry Report into abortion in NI it recommended that the NI Executive urgently: make age-appropriate,

¹⁵² John Gillen, ‘Gillen Review Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland Recommendations’ (DoJ, 2019).

¹⁵³ CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 42(c).

¹⁵⁴ John Gillen, ‘Gillen Review Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland Recommendations’ (DoJ, 2019).

¹⁵⁵ John Gillen, ‘Gillen Review Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland Recommendations’ (DoJ, 2019).

comprehensive and scientifically accurate education on sexual and reproductive health and rights a compulsory component of curriculum for adolescents, covering prevention of early pregnancy and access to abortion, and monitor its implementation.¹⁵⁶ The NI (Executive Formation etc) Act 2019 committed the UK Government implementing the UN CEDAW Committee's inquiry report recommendations on reproductive healthcare education in NI. However, the NIHRC understands that no specific action has been taken to implement this recommendation.

¹⁵⁶ CEDAW/C/OP.8/GBR/1, 'UN CEDAW Committee Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the UN CEDAW Report of the Committee', 6 March 2018, at para 86(d).

6. FURTHER STEPS?

- 6.1 There is a lot being done, but a lot more to do.
- 6.2 There has been a raft of new provisions aimed at tackling domestic and sexual violence and abuse. Taken together, they demonstrate a determined effort to eradicate domestic and sexual violence and abuse, which has not been seen for many years. The measures introduced by the Department of Justice NI and statutory partners reflect a years' long campaign by the charitable and voluntary sectors.
- 6.3 The two major legislative amendments that have been made, in the present context are: (i) removal of the defence of so-called 'rough sex gone wrong'; and (ii) introduction of a stand-alone offence of non-fatal strangulation or asphyxiation. This review has concentrated on the latter but recognises that the former is an integral part of the response.

Rough sex defence?

- 6.4 The law as to the defence of consent to serious harm has been clarified.
- 6.5 It is now explicit that: (i) a person cannot consent to serious harm (abolition of the so-called rough sex defence¹⁵⁷); and (ii) strangulation is a standalone offence (whether or not in the course of committing another offence). While there are links between the two they are not interdependent.¹⁵⁸ 'Serious harm' is defined as: (i) wounding or grievous bodily harm¹⁵⁹; and, (ii) actual bodily harm.¹⁶⁰ Bodily harm is not defined but has been interpreted by courts to include any act that causes

¹⁵⁷ Section 27 of the 2022 Act provides specifically that for the purpose of determining whether a person (A) who inflicts serious harm on another person (B) is guilty of a relevant offence, it is not a defence that B consented to the infliction of the serious harm for the purpose of obtaining sexual gratification. (2) The reference in subsection (1) to obtaining sexual gratification is to obtaining it for any person (whether for A, B or some other person).

¹⁵⁸ Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022

¹⁵⁹ Within the meaning of section 18 or 20 of the Offences against the Person Act 1861

¹⁶⁰ Within the meaning of section 47 of the Offences against the Person Act 1861.

discomfort or harm to a person's health. The harm does not need to be serious or long-term.

- 6.6 The courts have recognised that psychological harm caused to the victim and the particular vulnerability of a victim should influence the categorisation of the harm. Importantly, loss of consciousness can (and if the research is accepted should always) be seen as very serious harm, akin to that for an offence of wounding or grievous bodily harm and be reflected in the venue and sentence for the offence. In addition, it is suggested here that the other discernible effects of strangulation should always be treated as serious harm. This is particularly important given that a lack of external corroborative signs of injury will often shape a person's understanding of risk, dangerousness and harm.¹⁶¹

Standalone offence of non-fatal strangulation

- 6.7 A standalone offence of non-fatal strangulation has been enacted and is now in force. This is very positive. What it means is that a person commits an offence of non-fatal strangulation if they intentionally strangle another person and commits an offence if they do any other act to another person that affects that person's ability to breathe and constitutes a battery of that person. It is a defence for a perpetrator to show that the other person consented to the act. The perpetrator bears the burden of proving consent beyond reasonable doubt. It is not possible to consent to serious harm.¹⁶²
- 6.8 Importantly, the statute does not require any injury or particular level of force to be proven as part of the offence.¹⁶³ Despite that important provision, it is still critically important to test for injury and include any relevant report for the court. In the absence of any apparent injury, it is

¹⁶¹ In the Northern Ireland case of *R v Allen*, for example, the court reported the defendant as saying "[8] . . . He admitted that he had his hands on her neck, but he said, 'you can check her throat there was not even a mark from that.'"

¹⁶² Giving effect to *R v Brown* [1993] UKHL 19

¹⁶³ Section 28 Justice (SOTV) Act (NI) 2022.

known that strangulation and asphyxiation cause damage through oxygen restriction that requires specialist screening to identify.

- 6.9 While that is very encouraging, what is likely to make the most significant and long-lasting impact is a change to societal norms through awareness-raising, education, training and enforcement. The mindset of individuals and organisations must change. That is when we will see a real difference.
- 6.10 The true nature and scale of the issue in Northern Ireland must be assessed. This will only be possible when all relevant agencies identify when it has occurred and record comprehensive disaggregated data that can be analysed and used to target resources. Of course, to identify non-fatal strangulation properly requires public awareness raising and professional training. The Department of Justice has made a welcome commitment to an awareness-raising programme. It will be critical that partners and other stakeholders support that and that training is delivered expertly by those who are specialist practitioners with real experience of NFS and of Northern Ireland.
- 6.11 Public awareness raising is vital. The public needs to be aware so that it can be identified when a friend, family member, colleague is at risk. Victims need to be able to identify it themselves and to know that they need not accept it and that it is not trivial or a form of sexual expression. They must be encouraged to report. Those who offer services to the public need to identify victims or people at risk. For example, GPs, dentists and hairdressers are likely to deal with victims and are in a position to notice effects. In considering public awareness and professional training, education in schools cannot be overlooked. That is where it starts.
- 6.12 The Women's Research Development Agency has commented on the need for relationship and sexuality education (RSE), which "needs to include an honest discussion on non-fatal strangulation alongside a

discussion on domestic abuse and sexual violence. This issue needs to be placed both in the context of modelling healthy relationships and in the context of a frank discussion on consensual erotic asphyxiation as contrasted with non-fatal strangulation.” They go on to note this important point: “conversations must be frank and direct, and address issues that are often seen as uncomfortable...This is the most effective way to expose and undermine myths and also to ensure that those who do choose to engage in these acts do so with the best possible information on how to do so as safely as possible, understanding always that consent is essential.”¹⁶⁴

- 6.13 A victim will only report – remembering that strangulation is the edge of homicide – if that victim is convinced that they will be taken seriously and protected. Before applying pressure to women to report support services must be in place to respond. That must include, as bare minimum, appropriate forensic¹⁶⁵ and medical services but cannot end there. We know that many victims do not report because they have nowhere to go and if they remain they will be at greater risk. The services offered must therefore include suitable accommodation, social and welfare support, access to education for children, financial support and free, reliable legal advice.
- 6.14 There are wider societal issues but related directly to the success or failure of any strategy to tackle NFS.
- 6.15 By way of example, in the Violence against Women and Girls Strategy, victims and survivors highlighted recurring issues through their creative works which included that survivors and their children are often subject to a range of post-separation abuse, including financial abuse, physical and virtual stalking, and never-ending child contact dispute.

¹⁶⁴ WRDA 2021

¹⁶⁵ Forensic services tend to be available only when the attack is part of a sexual assault, and the majority of these attacks take place within domestic abuse, not involving sexual abuse.

- 6.16 A number of key points, which should be taken seriously, were made. They include as follows. Young women and girls experience violence and abuse from a young age, therefore education needs to be targeted at primary school level to effect real change. Families with children should be equipped with the tools and knowledge needed to promote healthy relationships from an early age. Prevention needs holistic ‘whole family’ interventions. Every point of access to support provision through authorities, provides a pathway to prevention.¹⁶⁶
- 6.17 Additionally, it is important to ensure that education outside of a formal school setting is undertaken to change behaviour. As victims and survivors say “the violence and abuse that women face does not exist in a vacuum, therefore educating whole communities and achieving core attitudinal and societal change are important preventative measures”.¹⁶⁷
- 6.18 In Northern Ireland, in 2019/2020 Women’s Aid NI provided refuge accommodation to 654 women but in the same year 381 women could not access safe, secure refuge accommodation because it was full. More women are staying longer than necessary due to difficulties finding housing due to housing shortage.¹⁶⁸ In England and Wales, it was recognised that within intimate partner relationships the availability of alternative safe accommodation is critical to the ability of a person to protect themselves and their children. During the consultation exercise for the Domestic Abuse Act 2021, this was explored. After an acceptance of the need for secure accommodation to be granted as a matter of urgency to those fleeing domestic abuse, Government has decided “not to implement... at this time”.
- 6.19 In terms of policing, the PSNI is showing real leadership. The PSNI has launched its first Tackling Violence against Women and Girls Action Plan

¹⁶⁶ Ending Violence against Women and Girls, Calls for Evidence, Summary Report, August 2022.

¹⁶⁷ Ibid.

¹⁶⁸ Women’s Aid Federation Briefing Paper February 2020.b

for Policing.¹⁶⁹ In launching the plan, Chief Constable Simon Byrne made clear the PSNI's recognition of the issue and its commitment to tackling it. He said "We cannot ignore the lived experiences of so many female victims. Harassment, intimidation, violence and abuse is a violation of human dignity." In response a number of themes and objectives were listed.

- 6.20 The PSNI undertakes to deliver to all officers and staff in front line policing roles specialist trauma informed training to support the introduction of new legislative provisions including new offences or "up skirting" and "down blousing" and has already delivered significant training. That is very welcome. PSNI should ensure that non-fatal strangulation training is delivered to all officers and staff in front line policing roles, before they commence their deployment. Training should be delivered by providers who are specialist in non-fatal strangulation and have experience of the Northern Ireland public protection framework. Such training should be coordinated through local partnerships.
- 6.21 The PSNI commits to adapting the Wanted Persons Risk Assessment Matrix to ensure those persons wanted for violence against women and girls are a prioritisation category. To that the PSNI should include and prioritise the elevated risk arising from past strangulation. The PSNI should participate with partner agencies in a public awareness campaign to improve understanding of risk. The PSNI should build into its risk matrix the elevated risk that arises when a person has strangled another and participate with partner agencies in a public awareness campaign to improve understanding of the risk from strangulation.
- 6.22 In respect of prosecutions, it should be made clear that non-fatal strangulation is serious and will usually involve injury even if not

¹⁶⁹ PSNI 26 September 2022 .

apparent. That should be considered in the context of pleas and sentencing remarks Judges.

- 6.23 As noted above, 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. Collection of data and reporting on the implementation and effectiveness of the new legislation is essential. The State and its public authorities will require their 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. Moreover, 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”.¹⁷⁰
- 6.24 Unless and until we know exactly what we’re dealing with, resources will be squandered and victims will suffer.

¹⁷⁰ 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).