English summary of Brå report 2020:6

The new consent law in practice

An updated review of the changes in 2018 to the legal rules concerning rape

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The Swedish National Council for Crime Prevention (Brå) – centre for knowledge about crime and crime prevention measures
The Swedish National Council for Crime Prevention (Brå) works to reduce crime and improve levels of safety in society. We do this by providing factual information and disseminating knowledge on crime and crime prevention work, primarily for the Government and agencies in the criminal justice system.

This report is a summary of the Swedish report The new consent law in practice report no 2020:6.

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Summary

On 1 July 2018, changes were made to the legislation concerning rape, meaning that the law is now based upon the absence of consent instead of the occurrence of violence, threats or a particularly vulnerable situation. The new law was welcomed by many people as constituting an important societal signal, but there were also concerns (particularly from lawyers) that it would be difficult to apply.

The Swedish National Council for Crime Prevention (Brå) has been commissioned to review the application of the new legal rules. We have looked at all 362 court judgements from 2019 that involved the consummated rape of a woman, as well as 37 judgements from courts of appeal, and one judgement from the Supreme Court. We have also studied crime statistics and have obtained opinions about how well the new rules have been applied from representatives of the legal system and from voluntary organisations.

This review has been conducted at a relatively early stage, and cannot therefore give any definitive picture. Nevertheless, Brå hopes that this report will be of value to discussions of the law's merits and of any difficulties or legal problems that could arise when courts are to apply the new rules.

The number of reports, prosecutions and convictions has increased since the law was changed

The number of reported instances of rape has increased since the new rape legislation came into force, although the rate of increase is no greater than during previous years. Even so, it is reasonable to assume that the legal changes have contributed to the continued increase in the number of reported rapes from the already high levels that followed in the wake of the #MeToo movement.

The clearest result that became apparent in the review is that there has been a marked increase in the number of prosecutions and convictions since the law was changed. The number of convictions increased from 190 in 2017 to 333 in 2019, which is an increase of 75 per cent. This indicates that it influenced the number of legal proceedings to a significantly greater extent than many had believed.

However, only a small proportion of the new convictions involve the new crime of negligent rape. Brå has only identified twelve such court judgements. One reason for this could be that, in the majority of cases, the courts do not perceive that the rule concerning negligent rape is applicable, and have instead chosen to either acquit the accused or to convict them of (intentional) rape.[1] One contributory factor for the low number of such judgements could also be that prosecutors almost never chose to use negligent rape as the primary charge when prosecuting. In 2019, this happened in just two cases; instead they added negligent rape as a secondary charge as a back-up.

New types of cases have reached the courts

One of the fundamental reasons for the changes to the law was to reinforce the legal protection against sexual assault. The previous rape legislation was considered to exclude:

such instances where a sexual act has been committed against a person who is not willing to participate in the sexual activity, but where there was no use of violence or threatening behaviour and the injured party is not considered to have been in a particularly vulnerable situation or position of dependence (prop. 2017/18:177 p. 22).

Examples of the types of vulnerability that have now received stronger legal protection include instances of so-called surprise rape and where the victim has remained passive during the assault.

One key question in Brå's assignment is whether the intentions of the legislators have been realised in the sense that cases are now resulting in prosecution and a conviction for rape where they would previously not have done so.

[1] Although the introduction of the new crime of negligent rape has not led to many convictions, it may still have been a factor in the increase in prosecutions as, in certain cases, prosecutors may otherwise have refrained from bringing a prosecution if they had not been able to refer to negligent rape as a secondary charge.

With this in mind, an analysis has been performed for all district court judgements from 2019 that involved the consummated rape of a woman. In consultation with the prosecutors concerned, Brå concluded that 76 of these judgements involved cases that would not previously have resulted in prosecution and/or a conviction prior to the changes to the law. Of these, half led to an acquittal, 26 led to a conviction for rape, and 12 resulted in a conviction for negligent rape. In those instances where a judgement had been appealed against, it is the final decision that has been counted.

This selection can be regarded as a minimum estimate. It is likely that the legal changes were of significance to both the prosecutors' decision to prosecute and to the courts' assessment of guilt, even in some additional cases that we have not identified.

The nature of the new cases

Apart from the difference that the act at the centre of the prosecution was not performed as a result of violence, threatening behaviour or a particularly vulnerable situation, the new cases in many ways resemble those that were brought before the courts prior to the legal changes. One further difference, however, is that the new cases more seldom concern rapes committed within the framework of a close relationship. By some distance, the predominant relationship is that the parties are known to each other.

To a large extent, this involves young people who have been partying at weekends, and where, as night approaches, they end up in a sexual situation that the injured party feels constitutes an act of assault. Sometimes they have had sex, kissed or in some other way expressed an interest in each other at an earlier stage of the evening; sometimes they have simply ended up in the same bed after a party where the intention was not that they would have sex.

A certain amount of minor violence may have occurred in some of the cases, but this violence has not constituted a condition for the sexual acts having occurred. It is not unusual that sexual intercourse that began as consensual becomes non-consensual due to the perpetrator suddenly becoming physically rough or certain acts being instigated that the injured party has not agreed to.

The review shows that, to a large extent, the new cases involve the very type of situations that the changes to the law were intended to cover – i.e. cases of surprise rape and cases where the injured party has reacted to the assault with passivity.

Brå has analysed the reasoning of the courts in these new cases with regard to the assessment of evidence, the requirement for consent, and the perpetrator's intent or negligence.

The courts' assessment of the evidence

Prior to the changes to the law, many rape cases were dismissed due to a lack of evidence, and, in cases where prosecution did not result in a conviction, this was often due to shortcomings in the evidence. In a general sense, it could be expected that problems relating to evidence should have been even greater in the new cases because the absence of violence or (for example) the inebriation of the injured party makes it harder to obtain evidence for this type of offence in the form of documented physical injuries or measurements of alcohol consumed. The reduction in the occurrence of evidence of injury is also confirmed by the review of judgements. In 2017, it was estimated that significant evidence of injury featured in 37 per cent of judgements (Brå 2019b), but this figure has sunk to 13 per cent in the new cases.

Despite this, the review of the 26 new convictions for rape suggests that the evidence in these cases was roughly as strong as in the convictions from 2017. In almost one third of the cases, there was very strong evidence, such as a recording of the event, a confession or the testimony of an eye-witness. This is almost twice the corresponding proportion for the convictions in 2017. On the other hand, however, there is now a greater proportion of convictions where the only evidence is a person in whom the injured party has confided – the proportion is now 31 per cent, as opposed to 16 per cent in 2017. In the other new cases, there is evidence in the form of (for example) calls to the emergency services and some form of apology from the accused.

In those cases that have resulted in a conviction for negligent rape, the objective requirements are often not so firmly met. In 9 of the 12 cases, there was no additional supporting evidence other than people who had not personally witnessed the event, but who had been told about it by the injured party.

The courts' assessment of the provision of consent

The main criticism of the changes to the law raised by lawyers was that it would be difficult to adjudge whether the injured party had participated voluntarily or not. Brå has reviewed various aspects of this question that have been actualised in the application of the law. This includes the significance of any previous intimate contact in the assessment, what has been assessed as constituting an adequate expression of refusal to consent, and in which cases passivity has been interpreted as silent consent and when it has instead been regarded as an expression of refusal to consent. Brå has also studied the occurrence of cases where the expression of consent has not been deemed to be adequate for the participation to be considered to be voluntary in the wider context of the situation – i.e. where the line is drawn between sex as a result of prolonged persuasion and rape.

The picture presented by the review is that, in those cases that resulted in a conviction for rape, it has been clearly established that the injured party did not wish to participate. In some cases, she has been taken by surprise; in other cases, she has not given the accused any signals that she wishes to have sex, and has reacted with passivity during the act due to being paralysed.

It is primarily in those cases that resulted in a conviction for negligent rape that there is greater uncertainty as to how the injured party's reaction – or failure to react – is to be interpreted. The judgements illustrate a range of different problems of application, and, in several of these cases, the outcome is far from given.

The boundary between reckless intent and gross negligence

The introduction of a consent law, where there is less clarity as to which types of sexual interaction are punishable by law, has led to greater uncertainty regarding how aware the accused was of the fact that the injured party did not voluntarily take part in the sexual act, and how this awareness affected the accused's actions. Furthermore, with the introduction of a new crime – negligent rape – this question of the level of awareness attains even greater significance.

The study by Brå shows that it is sometimes difficult for the court to decide whether the accused 1) understood that the injured party was unwilling to have sex or that there was a *great risk* that this was the case, and that the accused was indifferent to that risk (reckless intent); 2) understood that there was a *risk* of that being the case (negligent rape); or 3) fully believed that the injured party was taking part of their own free will, and that this belief could be regarded as being reasonable (no conviction). The boundary that is considered to be the most difficult to assess is the one between negligence and the weakest form of intent – reckless intent. In some cases, it can also be difficult to determine whether the accused realised that there was a risk that the injured party did not want to have sex – for example, when she has given mixed signals.

The length of prison sentences has increased

The crime statistics show that the average length of sentences for those whom the district court has given a prison sentence for rape of normal degree increased from 25.3 months in 2018 to 26.5 months in 2019. A comparison of district court judgements in 2017 and 2019 indicates that the increase in the length of prison sentences primarily applies to rapes that would have been punishable even before the law was changed. Average prison sentences for such offences are assessed to have become two months longer.

Views of the legal system

By conducting surveys of judges and defence lawyers, and by interviewing prosecutors and police officers, Brå has obtained their opinions of the changes to the law. The results show that there is quite a large variation between different occupational groups within the legal system with regard to the consequences of the legislative changes. *Prosecutors* are those who have the most positive view. Six in seven prosecutors believe that, on the whole, the changes have resulted in improvements. That which emerges from the interviews is that the changes have a good signalling value, and it has now become easier to bring about a prosecution and a conviction. They were also positive about the introduction of the crime of negligent rape, although several pointed out that there remains a lack of clarity as to what actually constitutes such a crime.

Judges were also generally positive, or at least were not negative. It must, however, be pointed out here that, in most cases, this view was not based on their own practical experience of such cases, but was more of a general opinion. Around one third of both prosecutors and judges find that the boundary between the definitions of reckless intent and gross negligence is unclear.

The *police officers* who responded were considerably more critical of the problems caused by the changes to the law. They believe that the new cases have resulted in a range of increased challenges for them. The police officers also identify to a greater extent the consequences of the legal changes from the perspective of the suspect. They can sometimes feel sympathy not only for the injured party but also for the suspect.

As for the *defence lawyers*, the majority had an overall negative attitude to the changes to the law. They feel that their work has been made more difficult since the law was changed, because it is hard to infer from the law what it is that constitutes a crime. Above all, they feel that the changes to the law have resulted in the principle of legal certainty being compromised.

Views of voluntary organisations

Three voluntary organisations[2] that work with issues of rape have provided written statements of their views. They are all very positive that the law for which they have been campaigning has now been introduced. They emphasise that it sends an important normative signal, and contributes to a reduction in the likelihood that the victim of rape believes that they have responsibility for what happened.

The voluntary organisations Fatta and Unizon both highlight the importance of spreading awareness of what the new law entails – both within the legal system and among all the young adults who will now have to comply with it. They have identified signs that representatives of the legal system have not always understood what the new law involves, and they therefore believe it is important that all who participate in the legal process – lawyers, prosecutors, police officers and judges – receive training in the implications of the new law and in what is meant by consent.

With regard to sexual education in schools, both organisations believe that this needs to incorporate the changes to the law to a greater extent than is currently the case, so that young adults are able to discuss and understand the implications of consent.

Brå's assessment

Although the updated law has only been in force for quite a short time, it can already be seen to have had an effect. The new law has resulted in a change in the sense that a range of actions that were not previously punishable as rape have now become so. This has led to a number of prosecutions and convictions for new types of actions. To a large extent, therefore, the intended changes have been achieved. One positive consequence of the change to the law, which has also been identified by those who work with people who have been subjected to sexual assault, is that they are now less likely to shoulder the blame for what happened, and that they now have the opportunity to seek legal redress by reporting the crime.

Brå's review does, however, identify a number of problems concerning definition in the application of the law. Such problems may jeopardise the principle of legal certainty. In the majority of cases, this is not a problem; it is primarily in the judgements concerning negligent rape that the difficulties arise. It is therefore important that more rulings that can provide guidance are made at a higher level. Above all else, what needs to be clarified in greater detail is what is to be regarded as constituting an expression of consent, when such an expression may be disregarded, and how the distinction between reckless intent and gross negligence is to be made.

It is hoped that Brå's study will contribute to continued discussions concerning how the law is to be interpreted – not only within the legal system, but also in everyday situations and in education. In Brå's opinion, it is also important to continue to systematically follow the application of the regulations for rape. In this context, there is also cause to include the effects of the changes to the law in cases where the injured party is a man. For such an analysis to be meaningful, however, this should be delayed until the

[2] The voluntary organisations *Fatta, Unizon* and *Storasyster*.

new law has been in force for a longer period, as there are very few men each year who are the injured party in cases of rape.