



Report of the Justice Committee

Petition of Layba Zubair: Consent law reform

August 2023

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Vanushi Walters
Chairperson

Petition of Layba Zubair

Recommendation

The Justice Committee has considered the petition of Layba Zubair—Consent law reform—and recommends that the House take note of its report.

Request to reform the laws regarding sexual consent

The petition was presented to the House on 27 September 2022. It requests:

That the House of Representatives urge the Government to reform the current consent laws.

Layba Zubair believes that the laws about sexual consent need to be changed. She considers that clear consent laws keep people, particularly young people, safe. Ms Zubair believes that reformation of the laws regarding sexual consent is long overdue. She seeks law changes which reflect international best practice and the current understanding of consent, to contribute to a safer Aotearoa.

Issues raised by the petitioner

The Consent Law Reform campaign supports the petition and collected more than 12,000 signatures from other people who would like the law to change. Community organisations, including Help Auckland, Dear Em, Thursdays in Black, Respect Ed, and Wellington Rape Crisis also support the petition.

The petition advocates that New Zealand legislation be changed to include an affirmative consent model and a positive definition of consent. Similar jurisdictions have already done so. Ms Zubair told us that “the legal system is flawed” and that laws around consent have not kept up with society. She sees “a clear disconnection between the Crimes Act, the common law, the media, and education surrounding this critical area”. Ms Zubair identified three issues in the current legislation which she believes require amendment: the definition of consent, the age of consent, and the idea of “reasonable belief”.

Definition of consent

The petitioner told us that the legislation lacks a “positive definition of consent”: what consent is, rather than what it is not. It only states what does not count as consent, and when it cannot be given. Ms Zubair gave an example of a positive definition: “consent is a free and voluntary agreement at the time of the sexual activity”.

In New Zealand, sexual crimes are criminalised under the Crimes Act 1961.¹ The Act states that “allowing sexual activity does not amount to consent in some circumstances”.² The Act includes a non-exhaustive list of situations and circumstances in which consent cannot be given. Ms Zubair considers that this is a negative model of consent. She believes that under

¹ See sections 127–144 of the Crimes Act 1961.

² See section 128A of the Crimes Act 1961.

this model consent can be presumed until it is explicitly withdrawn or an individual is “clearly not in a state” to consent.

Ms Zubair considers that the statutory framework does not align with public understanding of consent. New Zealand schools teach students about healthy, consensual relationships and the notion of consent as an “enthusiastic yes”. Ms Zubair is disappointed that the legislation does not reflect this. The petitioner considers that an affirmative consent model would better meet general principles of fairness and “knowability” for people than the current model.

Age of consent

The petitioner said that age is not mentioned in the Act as a relevant factor when determining when consent cannot be given. She noted that the Act states that “there is no presumption of law that a person is incapable of sexual connection because of his or her age”.³

Ms Zubair pointed out where the Act takes age into consideration:

- An offence of sexual conduct with a child under 12 years old, which has a maximum penalty of 14 years’ imprisonment (section 132).
- An offence of sexual conduct with a young person under 16 years old, with a maximum penalty of 10 years’ imprisonment (section 134).
- A defence against a charge of sexual conduct with a young person under 16 years old: if the defendant took reasonable steps to find out whether the young person was over 16 and believed that they were, and gained consent from the young person (section 134A).

Ms Zubair explained that the issue with the offences that explicitly take age into consideration is the limited maximum sentence length attached to them. We heard that Crown prosecutors often charge offenders with sexual violation, which has a maximum penalty of 20 years’ imprisonment. We heard from the Ministry of Justice that, of the sexual crimes listed in the Act, sexual violation is “the primary offence”. The offence is defined by a lack of consent and a lack of a reasonable belief that consent was given.

The petitioner said that prosecutors tend to use the offence of sexual violation even in cases involving children or young people because the high maximum penalty for that offence more appropriately reflects the severity of the act being dealt with. The petitioner told us that the consequence of the offence of sexual violation being relied on is that, regardless of the age of the victim, the defendant can argue that consent was given. She said that during trials, defence lawyers accuse young people of consenting to sexual conduct. Ms Zubair noted such a case involving a victim who was only six years old. We heard that court hearings can be re-traumatising for a survivor of sexual assault and we understand that this type of situation in particular would cause trauma for a survivor. The petitioner told us that the legislation is fundamentally inadequate and fails to keep children safe.

Reasonable belief

The petitioner explained the interpretation of reasonable belief in case law relating to sexual crimes. Section 128 of the Act defines the offence of sexual violation as rape or unlawful

³ See section 127 of the Crimes Act 1961.

sexual connection. Sections 128(2) and (3) state that rape or unlawful sexual connection has occurred if a person (person A) has sexual connection with another person (person B) without person B's consent to the connection and "without believing on reasonable grounds that person B consents to the connection". The petitioner said that, legally, this section is assessed to the standard of an objective reasonable person. If the defendant is found to reasonably believe that consent was given, then the conduct does not meet the legal definition of sexual violation. We heard that this means a defendant can simply argue that they believe consent was given.

Ms Zubair argued that the interpretation of "reasonable grounds" provides the opportunity for rape myths that are "prejudicial, stereotyped, or false beliefs that serve to downplay, deny or justify rape" to be aired in court. Rape myths include that a person's consent is implicit in their clothing choice or way of living. Ms Zubair told us that defendants argue that consent was given based on rape myths.

The petitioner brought the Supreme Court case *Christian v R* to our attention. She argued that the Court's ruling in that case "disempowers survivors of intimate partner violence". In its judgement, the Court said:

...if the participants in the sexual activity are in a relationship in which expectations have developed over time and the sexual activity is in accordance with those expectations, that may be capable of evidencing consent if there is nothing to indicate that the mutual expectations are no longer accepted.

Ms Zubair believes that this ruling sets a precedent of tolerance for predatory behaviour such as grooming, and manipulation of vulnerable victims where sexual violence reoccurs. She also considers that the reasonable belief of consent provision in New Zealand's sexual crime laws "mitigates and disincentivises the need for people to partake in communicative and affirmative consent".

International examples of reform of laws relating to sexual consent

We were told that many jurisdictions have adopted positive definitions of consent; several jurisdictions have also changed their *mens rea* formulation as it relates to reasonable belief.⁴ We heard that "New Zealand is now an outlier in this regard".

The petitioner provided examples of legal definitions of consent in comparable countries, which are listed below.

- Canada: "the voluntary agreement of the complainant to engage in the sexual activity in question".
- The United Kingdom: "a person consents if he agrees by choice, and has freedom and capacity to make that choice".

⁴ *Mens rea*: "(the mental element) is an ingredient of the offence and the prosecution is required to prove it (along with the physical element, the *actus reus*, of the offence). It requires the prosecution to prove that not only did a defendant engage in a prohibited act, but that defendant did so with the specified intent: the defendant's state of mind is important in assessing culpability". See the Legislation Design and Advisory Committee: Chapter 24 Creating criminal offences.

- New South Wales, Australia: “consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity”, “a person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agree to the sexual activity”, and “a person may, by words or conduct, withdraw consent to a sexual activity at any time”.
- Victoria, Australia: “consent involves ongoing and mutual communication and decision-making between each person involved [...] consent cannot be assumed and can only be based on a person's communication of consent (both verbal and non-verbal). As consent is not a static concept, communication should be ongoing throughout the act”.

Victoria’s legislation also includes positive statements of sexual autonomy:

- “a person does not consent to an act just because they consented to— a different act with the same person; or the same act with the same person at a different time or place; or the same act with a different person; or a different act with a different person”.

The petitioner said that if New Zealand looks at reforming its consent laws it should consider the Australian examples.

Legislative change requested

Ms Zubair considers that the time has come to reform New Zealand’s legislation. She believes that societal understanding of consent has increased and that this progress should be reflected in legislation. The petitioner considers that the law should be thoroughly reviewed and updated. The work to do this should include consultation with the sexual violence sector, legal academics, and communities. Ms Zubair wants to see strong legislation developed that empowers survivors and reinforces positive societal beliefs.

Comments from the Ministry of Justice

The Ministry of Justice explained that they have an “active and ongoing interest in the effectiveness of the criminal law, particularly with regard to sexual crimes”. They noted that sexual violence is one of the most serious crimes, and it is vital to ensure that the legal response appropriately recognises and responds to it by supporting victims and holding perpetrators to account.

The ministry agreed that the law does not provide a clear definition of consent. It also noted that there has been reform in comparable jurisdictions to address this issue. The ministry has discussed the legislation with academic experts, special service-providers, victim advocates, and legal professionals who consider that it is not fit for purpose. The ministry said that “experts in this area have a range of promising ideas for law reform”.

Our response to the petition

We thank Ms Zubair and her supporters for the petition and for bringing the matter to our attention. We commend Ms Zubair, who is a survivor of sexual abuse herself, for her courage to come forward with her story. Her submission was compelling and insightful. We agree that keeping young people safe is very important and we are interested in Ms Zubair’s ideas for law reform to better achieve this.

We note that in August 2023, the Government introduced the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill.⁵ The bill would increase the maximum penalty for sexual conduct with a child under 12 years old to 20 years' imprisonment (aligning it with the current penalty for the offence of sexual violation). The bill would also provide that the offence of sexual violation does not apply if the complainant is under the age of 12 years. The intended effect of this change is that children would no longer be questioned in court about whether they consented to sexual activity.

We consider that the proposed legislation may help to clarify consent in the situation of child complainants as raised by the petitioner. We do not support children under the age of 12 years being questioned in court about consent to sexual activity, and we do not consider it to be in line with the expectations of the public. We look forward to considering the proposed legislation if it is referred to our committee.

We also consider that the other matters raised by the petitioner are worthy of further exploration by the Government. We agree that the law on consent in this area is due for re-examination. Having a consistent definition of consent in the legislation may help to protect victims of sexual crimes. We think that the Government should consider examining offences involving sexual conduct and consider including a definition of consent in the legislation. We suggest that any such investigation should look at the experiences of sexual violence survivors and experts in the field to ensure that all victims of sexual crimes are appropriately protected by the law.

⁵ Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill.

Appendix

Committee procedure

The petition was referred to us on 27 September 2022. We met between 5 May and 17 August 2023 to consider it. We received written submissions from the petitioner and the Ministry of Justice and heard oral evidence from the petitioner.

Committee members

Vanushi Walters (Chairperson)
Dr Emily Henderson
Hon Paul Goldsmith
Anahila Kanongata'a
Marja Lubeck
Nicole McKee
Hon Mark Mitchell
Simon O'Connor
Arena Williams

Evidence received

The documents we received as evidence in relation to this petition are available on the [Parliament website](#).

- Hearing of evidence with the petitioner [5 May 2023](#).