

Sexual Violence Legislative Submissions
Ministry of Justice
PO Box 180
WELLINGTON

email to: svsubmission@justice.govt.nz

Submission to the Ministry of Justice on the Improvements to Sexual Violence Legislation in New Zealand Public Discussion Document.

The National Council of Women of New Zealand (NCWNZ) is an umbrella organisation representing 46 nationally organised societies. It has 26 branches throughout the country attended by representative of these societies and some 150 other societies, as well as individual members.

The Council's functions are to serve women, the family and the community at local, national and international levels through research, study, discussion and action. NCWNZ welcomes the opportunity to consider this discussion document. The response was prepared by the public Issues Standing Committee after consulting with members.

General Comments

There has been considerable discussion in NCWNZ in the last year about the need for changes to be made to the law because of the very low rate of reporting of sexual violence. The issues raised in this discussion document are all necessary parts of what needs to be changed, but NCWNZ is concerned that the discussion is very narrowly focused and there are other issues that should also be addressed:

There is a lack of a good human rights analysis.

The document displays a bias towards procedural rights as against substantive rights. The time taken for cases to come to trial violates both procedural and substantive rights, and human rights in general. The right to silence for the defendant militates against the complainant.

The defendant should have to prove whether consent was given.

There should be a balance of rights. At present the rights of the accused seem to be better protected than the rights of the complainant.

Specific Comments – response to questions

Question 1. Should the Crimes Act 1961 be amended to include a definition of what consent is (a positive definition of consent) to sit alongside the legal definitions of situations where consent is not considered to be present?

There is general agreement that the Act should be amended and that the list of circumstances should be extended to include the concept of free and voluntary agreement, and having the freedom and capacity to make the agreement. Also the wording of the definition needs to be as simple as possible.

The following reasons are given in support of the amendment:

The age of the victim.

The circumstances of the situation such as impairment of consciousness or diminished intellectual understanding.

It may help to improve the low rate of reporting by victims.

It would give better guidance to the jury and would mean less time spent on deciding whether or not consent had been given.

Without a positive definition consent could be assumed.
The balance of rights would be better.

Question 2. If you think that the law should contain a positive definition of consent, should this definition contain the concepts of freedom, choice, and the capacity to make the choice to consent to sexual activity?

The UN Declaration on Human Rights states in its preamble that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Concepts of freedom and choice are inextricably bound up in healthy intimate relationships. Including such concepts within a positive consent framework offers the opportunity to educate, and from notions of what constitutes male/female relationships of equality and respect.

The consent should be actively given, and not inferred by default.

It is not consent where there is fear or threat and the woman gives in for the sake of her safety. Being drunk or drugged is not an excuse to rape or abuse. Where there is diminished mental or intellectual capacity, extra care needs to be taken to ensure that there is consent.

Question 3. Which, if any, of the examples from overseas law, do you prefer as the basis for a New Zealand definition of consent?

There was a variety of responses from NCWNZ members to this question, although the majority preferred the United Kingdom law because it is very clear and uses the word 'choice'.

One suggestion is that there could be the addition of the word 'voluntarily' as in two of the Australian examples.

Another suggestion is that 'he' should be replaced with a more gender neutral word such as 'the', eg 'a person consents if they agree by choice'.

Alternative preferences are for the South Australian example because of the simple wording, and that it covers every aspect.

Another suggestion is for a combination of the United Kingdom and South Australian definitions.

One response is a preference for the Canadian example as being more balanced.

Question 4. Should the Crimes Act 1961 be amended to require that, when determining whether the accused had reasonable grounds to believe the complainant consented to sexual activity, the court must have regard to all the circumstances relevant to the case including any steps the accused may have taken to ascertain whether the complainant was consenting?

NCWNZ fully supports this for the following reasons:

It should have the effect of sending a clear message that consent must be obtained on every separate occasion.

The accused must always be held accountable for ascertaining that the complainant was actively consenting.

It provides a more balanced hearing as the accused has to demonstrate what steps, if any, were taken to establish whether the complainant was consenting. At present the focus tends to be on the complainant rather than on the actions of the accused and has led to women as the complainant feeling as if they are on trial as well as the accused. When determining whether the belief of consent was reasonably held, all circumstances need to be taken into account. Such changes have been implemented in the United Kingdom's Sexual Offences Act 2003 (sections 1-4), which allow for the court to presume consent was not given under certain circumstances. These circumstances are

when there are conclusive presumptions such as 'the offender intentionally deceived the victim about the nature and purpose of the act', or evidential presumptions such as 'the victim was drunk/drugged without her consent and the offender knew it'.

It allows not only the victims to give their reasons for why they did not consent, but also allows the accused to give their view of why they considered the victim was agreeing.

Any steps that can be taken to decrease sexual violence must be taken, and if they victim as to provide evidence about consent, so should the accused need to give clear and valid reasons to show the consent.

It will provide the jury with more information.

Question 5. Do you support any of the other options above, and if so, why?

There is also considerable support for Option 3.

Question 6. Do you support the preliminary proposal (option 2, above) to amend the Evidence Act to extend the rape shield so that evidence about previous sexual experience between the complainant and any person, including the accused, is inadmissible without prior agreement of the judge? Why, or why not?

NCWNZ supports this amendment for the following reasons:

A rape shield blocks the introduction of opinion and reputation evidence. Rape shield laws are important as they protect the complainant's right to be treated with fairness and dignity, and not to have the jury prejudiced by their past sexual history. Past sexual history should not be used to discredit the complainant, and is not a reason for rape to be acceptable. It could also mislead or distract the jury from the actual relevant points. The complainant should have the same protection as the accused who is not required to make this information available.

Previous sexual experience may have absolutely no relevance to the present case and the person's life situation.

The judge must decide if there is a particular reason for disclosure.

Question 7. What are the main problems with the current system?

Often victims feel it is a waste of time calling the police or reporting sexual violence. They believe no help will be provided, as there is the public attitude of 'she asked for it'. Women need to know that there is somewhere to call for help.

Anecdotal evidence is that the adversarial system is a terrifying process and is unfairly arduous for victims. It can leave a victim more traumatised than if she had not reported the case. The victim feels that she is being put on trial.

Where rape trials are carried out under the adversarial system the media can, and often do, report in a way that is harmful to the complainant who becomes victimised again.

The adversarial system is culturally inappropriate for Maori and Pacific women.

There is not enough support for disabled women who are victims of sexual violence.

Question 8. What areas should be priorities for government to address?

Change or amend the law so that it works better for women/victims.

The process for reporting sexual violence incidents:

There needs to be a system which achieves a higher reporting rate;

Wide publicising of how and where to report an assault;

Providing alternatives other than the police for reporting.

There should be specialist training for those involved in sexual violence cases such as Sexual Assault Referral Centres.

Adequate funding should be available to organisations such as Rape Crisis so that they are able to give support and advocacy for women. This support should be available throughout the whole process, and the whole country.

Reducing secondary trauma for victims should be a priority.

An acknowledgement that there may need to be different approaches for people of different ethnicities.

Question 9. Are there particular models or alternatives that should be explored?

There is considerable support from NCWNZ members for some form of specialist court such as the South African or Victorian model, with the possibility of a trauma unit to give victims support and counselling.

There is also some support for the inquisitorial system where a magistrate conducts and inquiry into the case, because it could provide a fair hearing while offering vulnerable people some safety and protection.

Several responses favour the Restorative Justice model. One of these cites a model which is in operation in Arizona. With four goals, the aim of the model is to hold the person accused of an act of sexual violence accountable for the harm that has been done to the survivor and to the community that they are part of. Work is done to provide an avenue for reintegration of the accused into the community. Survivors of sexual violence are treated with respect, thus being validated and given a safe process for face-to-face justice, which empowers them to shape the resolution. Public safety is increased by engaging the social support networks of both the victim and the accused to reduce recidivism.

Summary and Concluding Comments

There is as very strong concern expressed by NCWNZ members that the present adversarial system does not work for victims of sexual violence. Those who are brave enough to allow their complaint to progress through the police and court systems have a very hard time. The case often becomes one person's word against another. The right to silence is extremely problematic, affecting the ability to get a prosecution.

NCWNZ is of the opinion that a better system needs to be devised to deal with cases of sexual violence so that justice for the victim is able to be achieved, and that victims feel able to report that violence has occurred.

A criminal justice system is needed that is responsive, and that keeps the victims informed of their rights. There needs to be a gender balance in those who have specialist knowledge – the police and judges, for example.

Specialist training is needed for the professionals who deal with cases of sexual violence, and a specialist court established for hearings. Experts in court could be used to explain why victims act in the way that they do.

This document has much to commend it as a start to a more fair treatment for victims of a particularly cruel crime. The progress of this discussion will be watched with extreme interest.

Christine Low
National President

Joan Macdonald
**Convener, Public Issues Standing
Committee**