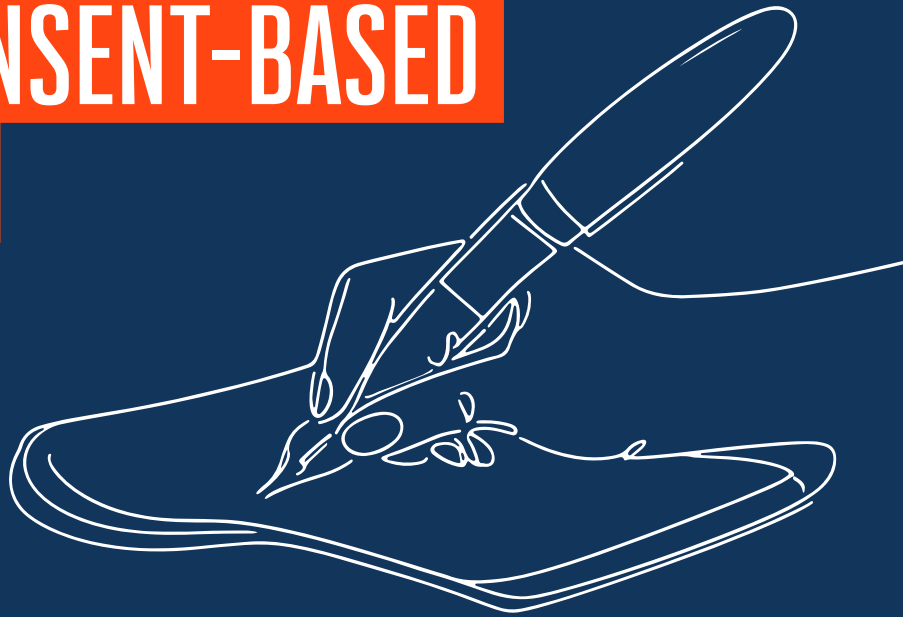


POLICY BRIEF FOR LEGISLATING ON SEXUAL VIOLENCE WITH A CONSENT-BASED APPROACH



Appropriate legal definitions of sexual violence are pivotal to the ability of the criminal justice system to successfully and fairly prosecute rape and other forms of sexual violence. They also play a strong role in holding perpetrators accountable and guaranteeing justice for victims.

Discriminatory myths and stereotypes about gender and sexuality are embedded in many legal frameworks and can contribute to normalizing sexual violence, or blaming and shaming survivors, instead of establishing the culpability of perpetrators.

Outdated, weak, or discriminatory definitions of sexual violence, when not based on a strong understanding of **consent**, can dissuade survivors from reporting and create a lack of clarity for court proceedings, low conviction rates, and a lack of trust in the legal process. Such definitions are also obstacles for States to fulfill their international and regional obligations.

Parliamentarians' advocacy and efforts are central to aligning national legislation with international and regional standards and ensuring their country's compliance with the standard of due diligence in sexual violence crimes. Closing the legal gaps related to consent can open the door to justice for many survivors in the Americas and the Caribbean, shaping a culture that understands that consent is essential in all sexual encounters.

The standard of consent

International standards require that legal definitions of rape and other forms of sexual violence should be based on the lack of **voluntary and free consent**.

Definitions of rape and other forms of sexual violence that are based on force or the threat of force, as opposed to lack of consent, fail to meet human rights standards. In *Ángulo Losada vs. Bolivia (2022)*, the Inter-American Court of Human Rights established that “criminal offenses related to sexual violence should focus on consent as the central element,” rather than the outdated paradigm of resistance or the use of force by the victim.

Force-based definitions are problematic for several reasons, for example:

- **They perpetuate rape myths**, asserting that it is the responsibility of victims to protect themselves and that if a victim does not fight back they must be a willing participant in the sexual act. Victims who may freeze, remain passive out of fear of further harm, or respond to violence by shutting down would not be protected by the law.
- **Requirements to demonstrate force significantly limit the extent to which rape can be prosecuted successfully.** For numerous reasons, including fear of retaliation, loss of family support, or social stigma, survivors do not always report sexual violence immediately. This is particularly true in the case of children and adolescents, who may not know that the acts done to them constitute a crime or who may find it difficult to report or raise the issue at the time, especially when the perpetrator is a relative or other trusted person. It is then nearly impossible to later procure physical or medical evidence from bodily injuries to prove that additional physical violence was used.
- **A person can rape without the use of physical force or violence.** Some perpetrators use coercion or exploit their position of power, maturity, or other advantage to rape. Examples can include unequal power relationships such as teacher-pupil, coach-athlete, counsellor-patient, and prison warden-prisoner, among others.

The MESECVI Committee of Experts states in *General Recommendation No. 3* that “consent cannot be inferred when there is a power relationship that compels the victim to the act for fear of the consequences, taking advantage of a coercive environment.”

The focus should therefore be on whether consent was given voluntarily, with autonomous free will, recognizing that:

- Consent **may be modified or rescinded at any time** during the course of a sexual interaction.
- Consent must be assessed in the **context of surrounding circumstances** with recognition of a broad range of **coercive** situations where consent cannot be given, such as when positions of vulnerability, trust, influence, and dependence are exploited.
 - ▶ A victim may acquiesce to a sexual act but the act is unwelcome and/or engaged in unwillingly such as by means of non-physical pressure.
- It is relevant to consider whether the alleged perpetrator reasonably considered and took the necessary steps to determine if the complainant/survivor was giving consent.

Legal frameworks should also be drafted in ways that recognize that women and girls are the vast majority of survivors of sexual violence, and men are the vast majority of perpetrators, but provide full protection for all people in all circumstances, regardless of sex, gender identity, or sexual orientation.

How should consent be defined?

- (1) Voluntary and free consent means knowingly and willingly agreeing to participate in sexual intercourse or acts with another person.
- (2) Voluntary, and free consent —
 - (a) must be affirmatively perceived by all parties and can be expressed through words, actions, conduct or otherwise;
 - (b) cannot be inferred from silence by the victim;
 - (c) cannot be inferred from non-resistance, verbal or physical, by the victim;
 - (d) cannot be solely inferred from the suggestion, request, or communication by the victim regarding the use of a condom or birth control;
 - (e) cannot be inferred from the victim's past sexual behaviour;
 - (f) cannot be inferred from the victim's past or present relationship, sexual or otherwise, with the alleged perpetrator;
 - (g) must encompass the entirety of the sexual act(s) engaged in;
 - (h) may be rescinded or modified at any time; and
 - (i) must be assessed in the context of the surrounding circumstances.
- (3) Contexts in which a victim is considered incapable of voluntarily and freely consenting include but are not limited to:
 - (a) when the victim is a minor below the age of 16, except in the cases of close-in-age provisions explained in ["Romeo and Juliet" clauses](#);
 - (b) when the victim is unconscious, asleep, or intoxicated as a result of drugs or alcohol consumed voluntarily, involuntarily or unknowingly;
 - (c) when the victim is ill, suffering from a bodily injury, or otherwise rendered particularly vulnerable;
 - (d) when the victim lacks the capacity to give consent because of the victim's physical, mental or intellectual impairment or disability;
 - (e) when the participation is a consequence of the perpetrator taking advantage of a position of power, trust, influence or dependency.

Legislative recommendations for parliamentarians

- Ensure that legal definitions of rape and other crimes of sexual violence are not based on a requirement of force, but rather on consent as the central element.
- Ensure that the legal definition, of rape covers all forms of sexual penetration, however slight, of the vagina, anus, or mouth with a body part, object, or animal.
- Ensure that the law recognizes all circumstances where it is not possible to give voluntary and free consent and that it must look more broadly at the issue of exploitation, including sexual violence in the context of family or other relationships where there is particular dependency or inequality of power in relationships.
- Eliminate [estupro](#) or similar provisions that treat rape of adolescents as a lesser offense.
- Remove all provisions that exempt a charge of rape in the context of marriage or an intimate relationship.
- Eliminate statutes of limitation for cases of rape and sexual violence in cases of both adult and minor victims.
- Ensure the existence of close-in-age provisions that allow without punishment consensual, non-exploitative sexual activity between adolescent peers.
- Ensure that sentences for sexual violence crimes are commensurate with the gravity of the acts involved.

Other parliamentary actions

- Actively integrate civil society and survivors of sexual violence in policy spaces and budgetary processes and include them in the designing of laws, policies, and budgets.
- Ratify and provide oversight on national implementation of the [Belém do Pará Convention](#), [CEDAW](#), the [Convention on the Rights of the Child](#), and other regional and international instruments for the greater protection of women and girls.
- Advocate for and monitor the training of justice system officials, including police, prosecutors, and judges, to respond to cases of sexual violence in a victim-centered and trauma-informed way, supported by protocols on investigation, processing, and prosecution of sexual violence crimes from a gender and intersectional perspective.
- Call for the collection of disaggregated data to evaluate the efficacy of sexual violence legislation and improve preventive measures and those that centre consent.
- Promote age-appropriate consent and relationship education programs in schools.
- Support the development of awareness-raising campaigns to inform the public of their rights and obligations, and to improve knowledge of laws related to sexual violence, reporting procedures, support services, and methods to preserve evidence.

The countries of the Americas and Caribbean fall short on a number of these recommendations. For instance, according to Equality Now's [research](#), 23 of the 43 jurisdictions surveyed in the region require the use of additional violence, threat, or using the victim's physical helplessness, incapacity, or inability to resist as elements of rape.

This factsheet is a shorter version of the Policy Brief for Legislating on Sexual Violence with a Consent-Based Approach and is based on [Equality Now's](#) fact sheet [Consent-Based Rape Definitions](#) (2021) and its publication [Failure to Protect: How Discriminatory Sexual Violence Laws and Practices are Hurting Women, Girls, and Adolescents in the Americas](#) (2021) which includes an [Annex](#) of applicable laws on sexual violence in the Americas and Caribbean region.



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