

PART V Draft Legislation on Sexual Assault and Related Provisions

5.1 Sexual Assault

5.1(1) Definition of Sexual Assault

(substitute existing section 375 with the following)

s. 375 Sexual Assault.-

(1) Notwithstanding anything else contained in this Code, a person commits sexual assault against another where such person engages in any of the activities set out in subsection (2)(a) to 2(c) against the will or without the consent of the other person against whom such offense is committed.

Provided that where such sexual assault is committed against a minor, the question of consent is irrelevant.

Explanation 1: A minor is a person who is 16 years of age or under.

Explanation 2: Any consensual sexual activity between two adults does not fall within the purview of this section.

Explanation 3: Sexual assault committed by a husband against his wife falls within the purview of this section.

(2) For the purposes of this section sexual assault includes:

- (a) The introduction (to any extent) by a man of his penis into the vagina, the external genitalia, anus or mouth of another person.
- (b) The introduction (to any extent) by a person of an object or a part of the body, other than the penis, into the vagina or anus of another person;
- (c) Where any person, for the purpose of sexual gratification, touches directly or indirectly, with a part of the body or with an object, any part of the body of another person.

Punishment

(3) Every one who commits a sexual assault is punishable with a mandatory minimum sentence of imprisonment of either description of five years which may extend upto imprisonment for life and shall also be liable to fine.

(This offence shall be cognisable, non-bailable, non-compoundable, and triable by a Court of Sessions).

5.1(2) Aggravated sexual assault

(the following new provision be added after section 375)

s. 375A Aggravated Sexual Assault.-

(1) A person commits aggravated sexual assault when:

- (a) at the time of, or immediately before or after, the commission of the offense, the alleged offender maliciously inflicts actual bodily harm on the complainant or any other person who is present or nearby; or
- (b) at the time of, or immediately before or after, the commission of the offense, the alleged offender threatens to inflict actual bodily harm on the complainant or any other person who is present or nearby by means of an offensive weapon or instrument; or
- (c) the alleged offender is in the company of another person or persons; or
- (d) the alleged victim is under the age of 16 years; or
- (e) the complainant is (whether generally or at the time of the commission of the offense) under the authority, in the trust, guardianship or custody of the alleged offender; or
- (f) the alleged victim has a serious physical disability; or
- (g) the alleged victim has a serious intellectual disability; or
- (h) the alleged offender being a police personnel sexually assaults the complainant :
 - (i) within the limits of a police precinct; or
 - (ii) in his or her custody or in the custody of a police person subordinate to him or her, or
 - (iii) while such person is in uniform; or
- (i) the alleged offender being a personnel of the Armed Forces commits sexual assault on the complainant while on duty; or
- (j) the alleged offender being a public servant commits sexual assault on the complainant in his custody or in the custody of a public servant subordinate to him; or
- (k) the alleged offender being on the management or staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution commits sexual assault on any inmate of such jail, remand home or institution; or
- (l) the alleged offender being on the management or staff of a hospital commits sexual assault on the complainant in that hospital.

Explanation: The above provision is not comprehensive and leaves open the possibility of other circumstances which a judge considers as aggravating the crime of sexual assault.

Punishment

- (2) Any person who commits an aggravated sexual assault shall be punished with imprisonment for a mandatory minimum period of seven years, which may be extended to life-imprisonment together with a punitive fine.

Explanation.- Where the complainant is sexually assaulted by one or more group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed sexual assault within the meaning of this sub-section

- (3) Any person who commits an aggravated sexual assault and wounds, maims, disfigures or endangers the life of the complainant shall be punished with imprisonment for a mandatory minimum period of ten years, which may be extended to life imprisonment together with a punitive fine.

(The offence shall be cognisable, non-bailable, non-compoundable, and triable by a Court of Sessions).

5.1(3) Explanation

Women experience rape as assault. It is a violation of a woman's right to sexual autonomy and wrong because it is an unjustified interference with her physical person. The new proposal seeks to eliminate rape from the Penal Code and replace it with sexual assault, aggravated sexual assault, and sexual assault with a weapon, threats to a third party, or causing bodily harm. The new definition focuses attention on the elements of the actual crime rather than the complainant.

By doing away with terms such as rape and indecent assault, some of the sex discrimination in terms of the interpretation and application of the law will be mitigated. The new definition stresses the assaultative rather than the sexual nature of sex offenses which will help remove the stigma attached to such charges and serve to correct public misconceptions about the nature of these acts.

5.2 'Consent'

5.2(1) Meaning of consent

(the existing section 376 shall be replaced with the following :)

- s.376.(1)(a) For the purposes of this chapter, 'consent' means the unequivocal voluntary agreement of the woman to engage in the sexual activity in question.
- (b) Without limiting the generality of (a), but for greater certainty,
- (i) There is no unequivocal voluntary agreement where the complainant has, by words or gestures, communicated unwillingness to participate in the sexual activities which form the subject matter of the charge. In this respect, words such as 'no', stop, "don't", "I don't want to", or like expressions in any language constitute such lack of voluntary agreement.
 - (ii) Actual or rumored sexual activity with the accused or with another individual or individuals on prior occasions does not constitute unequivocal voluntary agreement to the sexual activities with the accused which form the subject matter of the charge.
 - (iii) Voluntary agreement to specific sexual activities with the accused on the occasion culminating in the criminal charges does not constitute unequivocal agreement to any or all further or subsequent sexual activities with the accused. Once the complainant has, by words or gestures, communicated unwillingness to continue sexual contact with the accused or to engage in particular sexual activities with the accused, prior voluntary agreement, if any, is negated.
 - (iv) Voluntary agreement to sexual activity cannot be presumed from the complainant's economic class, sexual identity, marital status, or membership in a particular class, racial, ethnic or religious group.

(2) For the purposes of section 375 and 375A and without limiting the grounds on which it may be established that consent to the sexual activity is vitiated, no consent is obtained where:

- (a) the complainant submits or does not resist by reason of

- (i) the application of force to the complainant or to a person, other than the complainant; or
- (ii) the threats or fear of the application of force to the complainant or to a person other than the complainant; or
- (iii) fraud, which includes any false representation or any significant lie which influences the decision to agree to sexual activity; or
- (iv) the exercise of authority or abuse of position of trust or social, economic or institutional power to secure sexual compliance on the basis of the accused person's power to deny the complainant, or any person other than the complainant, significant benefits or necessities of life; or
- (b) the complainant consents to the sexual activity with another person:
 - (i) under a mistaken belief as to the identity of the other person; or
 - (ii) under a mistaken belief that the other person is married to the complainant; or
 - (c) the agreement is expressed by the words or conduct of a person other than the complainant; or
 - (d) the complainant is incapable of consenting to the activity; or
 - (e) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
 - (f) the complainant is mistaken about the sexual nature of the act or mistakenly believes that the sexual activity is for medical, hygienic, ritualistic, purificatory, therapeutic, psychological or spiritual purposes; or
 - (g) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Explanation: This provision is not comprehensive and leaves open the possibility of other circumstances which may vitiate consent.

- (3) A person who does not offer actual physical resistance to sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

5.2(2) Explanation of New Proposal

The meaning of consent if interpreted consistent with sex equality principles, would render any elaboration unnecessary. However, the experience in court demonstrates that as an educational measure alone, it is useful to be very clear and explicit and in particular to make reference to some of the more common place situations in which myths and stereotypes surface to bolster the defence of mistaken belief, and justify the admission of irrelevant or marginally relevant, but highly prejudicial, sexual history evidence.

5.3 Defence of honest but reasonable mistake

(the following provision may be added in the chapter entitled 'General Defences' in the Indian Penal Code)

s. 79A(1) It is not a defence to a charge under sections 375 and 375A that the accused believed that the complainant consented to the sexual activity that forms the subject-matter to the charge, where

(a) the accused person's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or willful blindness;

or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

(2) When an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, the Court, if satisfied that there is sufficient evidence to support such a claim, shall, when reviewing all the evidence relating to the determination of the honesty of the accused person's belief, consider the presence or absence of reasonable grounds for that belief.

5.4 ~~Repeals~~ Amendments of Related Provisions

5.4(1) s. 377 Unnatural offenses-

It is recommended that this provision be repealed entirely. If such acts are consensual then they are not criminal. If they are non-consensual then the activity would be covered by s. 375 and 375A as redrafted under the new proposed bill.

5.4(2) Sexual Harassment (IN SEPARATE MEMORANDUM)

5.4(3) Criminal Procedure Code

5.4(3)(i) (the following sub-section (3) be added at the end of Section 221 of the Cr.P.C.):

s. 221(3) When a person is charged with sexual assault or aggravated sexual assault and the court is of the opinion that such person is not guilty of that offense but is guilty of an offense under one of the sections 354, 509, 376A-D or 377 A-C of the Penal Code, such person may be convicted of that offense although not initially charged with it.

5.4(3)(ii) (New sub-sections 3 to 8 be added to section 160 of the Code of Criminal Procedure as under):

(3) Where under this chapter, the statement of an alleged victim of a sexual offence is to be recorded and the said victim is a woman or a minor, such statement shall be recorded either by a woman police officer or by a woman social worker in the absence of a woman police officer.

(4) Where the woman police officer is not available to record the statement of an alleged victim of sexual assault, the officer in charge of the police station shall, in order to facilitate the recording of the statement, forward to the woman social worker referred to above a written request setting out the points on which information is required to be elicited from the alleged victim.

Provided that in special circumstances to be recorded in writing, where expediency and the interests of justice so demand, or where the above procedure would entail delay leading to the destruction of evidence crucial to the crime, the statement of an alleged victim of sexual assault or aggravated sexual assault may be recorded by a male police officer.

(5) the person to whom such a written request is forwarded shall, after recording the statement of the alleged victim, transmit the record to the officer in charge of the police station.

(6) Where the statement recorded by such person as forwarded under subsection (5) appears in any respect to require clarification, the officer in charge of the police station shall return the papers to the person by whom it was forwarded, with a request for clarification or amplification on specified matters; and such person shall thereupon record the further statement of the alleged victim in conformity with the request and return the papers to the officer in charge of the police station.

(7) The statement of the alleged victim recorded and forwarded under subsection (3) to (6) above shall for the purposes of the law relating to the admissibility in evidence of statements made by any person, be deemed to be a statement recorded by a police officer.

(8) Where, under this chapter, the statement of a male person under the age of 16 years or of a woman is recorded by a police officer, either as a first information of an offence or in the course of an investigation into an offence, a relative or friend of such male person or woman, and also an authorised representative of a woman's organisation shall be allowed



report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of subsection (5) of that section.

Explanation:- For the purposes of this section and section 164A, the term "registered medical practitioner" shall have the same meaning as given in the Explanation to section 53 of the present Code.

5.4(4) Evidence: (REPEALED)

Admissibility of Evidence Regarding Prior Sexual Conduct:

(a) Section 155(4) of the Indian Evidence Act be repealed, and the following provision be added as section 155A:

155A (1) In proceedings in respect of an offense under sections 375, 375A, 376, 354, 509 evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

(2) In proceedings in respect of an offense referred to in subsection(1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge determines, in accordance with the procedures set out in this section that the evidence

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) *Factors that judge must consider:* In determining whether evidence is admissible under subsection(2), the judge shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the potential prejudice to the complainant's personal dignity and right of privacy;

(f) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(g) any other factor that the judge deems relevant.

(4) The judge shall consider an application by the defence, a copy of which must be given to the prosecutor, setting out the particulars of the evidence that the accused seeks to adduce, and the relevance of that evidence to an issue at trial, and such application shall be considered with the public excluded.

(5) Where the judge is satisfied that the evidence sought to be adduced is capable of being admissible under subsection 3A (2) the judge shall grant the application and hold a hearing to determine whether the evidence is admissible. The public shall be excluded from such hearing.

(b) Section 146 shall be amended to incorporate a proviso at the end of subsection (3) as follows:

Provided that no question shall be asked in cross-examination of the prosecutrix or complainant in an offense under sections 375, 375A, 376, 354, and 509 of the Indian Penal Code except according to the rules laid down in section 155A below.

PART VI Draft Legislation on Sexual Abuse of Children and Young Persons

6.1 Definitions:

(The following sections shall be included in the Indian Penal Code under a separate sub-heading "Of Sexual Abuse of Children and Young Persons". These draft proposals are drawn from the law in Canada and the draft proposals suggested by the adhoc subcommittee. Although these provisions are numbered 377A-C for reasons of expediency, it is a matter of concern that the historical baggage of section 377 not be allowed to inform these provisions in any way.)

s.377A Sexual Interference.- Any person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of sixteen years is guilty of an offense under this section and is punishable with imprisonment of either description which may extend to ten years.

s.377B Invitation to sexual touching.- Any person who, for a sexual purpose, invites, counsels or incites a person under the age of sixteen years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of sixteen years, is guilty of an offense under this section and is punishable with imprisonment of either description which may extend to ten years and with fine.

s.377C Sexual Exploitation and Abuse of Young Persons.-(1) Any person who is in a position of trust or authority towards a young person or is a person whom the young person is in a relationship of dependency and who

(a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person, or

(b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,

is guilty of an offense under this section and is punishable with imprisonment of either description which may extend to five years and with fine.

(2) In this section young person means a person sixteen years of age or more, but under the age of eighteen years.

6.2 Consent no defence

(The following section may be included as section 79B in the Indian Penal Code:)

s.79B (1) Where the accused is charged with an offense under section 377A-C or is charged with an offense under section 375 or 375A in respect of a complainant under the age of sixteen

years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

(2) Notwithstanding subsection(1) where an accused is charged with an offense under section 377A-C in respect of a complainant who is twelve years of age or more, but under the age of sixteen, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused:

- (a) is twelve years of age or more but under the age of sixteen years; and
- (b) is less than two years older than the complainant; and
- (c) is neither in a position of trust nor authority towards the complainant nor is a person with whom the complainant is in a relationship of dependency.

(3) No person aged twelve years or below shall be tried for an offense under section 377A-C unless the person is in a position of trust or authority towards the complainant or is a person with whom the complainant is in a relationship of dependency.

(4) It is not a defence to a charge under section 377A-C that the accused believed the complainant was sixteen years of age or more at the time the offense is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

6.3 Explanatory Note and Guidelines for Examination of Children and Young Persons

(i) Person in Position of Trust:

Under the proposed sections a person in the position of trust is not defined, but ought to include a parent; step-parent; adoptive parent, foster parent, or legal guardian; grandparent; uncle; aunt; boarder in a young person's home, teacher, baby-sitter, domestic servant; and employer. The offense created under this section is not the same as nor does it include the offenses created under the proposed sections 375 and 375A.

(ii) Presentation of Evidence by a minor:

There should also be guidelines or provisions formulated giving the complainant who is a child or young person the right to give evidence in the form of a videotape (cf. section 27 of the *Summary Proceedings Act 1957*, June 23, 1993, New Zealand), or where no such facility is available, to permit the child or young person to give evidence behind a screen so as to protect her/his identity and public exposure.

(iii) Consent Defence in certain Cases:

The proposed section 79B creates a consent defence where the complainant is under sixteen years but over twelve years of age in order to protect the conduct of young people experimenting with sexuality or sexual activity from being criminalised if the conduct was consensual.

(iv) Expert Evidence in Cases of Sexual Abuse of Children and Young Persons:

As regards expert evidence in respect of sexual abuse of children and young persons, addressed in the proposed sections 377A-C, rules need to be formulated to guide the judge in this unexplored and untested terrain in India. It should be open for the expert to give an opinion that certain observed behaviour, demeanour and other facts suggest that the child was sexually abused. A psychologist and social worker can also give expert evidence to the effect that a letter written by the child complainant, recanting the allegations of sexual abuse by, for example, her father, was typical of the recantations commonly seen among children who have been sexually abused when they realise the problems that their revelations have caused.

The defence should also be entitled to call witnesses to testify that the complainant should not be believed and give a basis for their opinion, in particular, that the child is known to tell strange tales of sexual assault. However, it should also be open to the prosecution, in light of such evidence, to call witnesses who would rely on the sworn testimony of the child, and call evidence from experts who have examined the child, to explain why the child would tell such tales of sexual assaults.