

Our detailed comments from Sexual Violence Perspectives

DRAFT CRIMINAL CODE

Chapter 18- Offences relating to Sexual Intercourse**s220 - Prohibition to cause an act of rape**Definition of Physical Act of Rape

Firstly, we recommend amending the definition to be gender-neutral, in order to protect the entire Nepali community from sexual crime, recognizing that males, females and third gender can be victims of rape. This can be achieved by amend sub-section (2):

*(2) If any **person** commits sexual intercourse with any **person, including marriage partner**, without **his/her** unequivocal and voluntary consent or commits sexual intercourse by taking the consent with any **person** under sixteen years of age shall be deemed to have been committed "Rape".*

Secondly, the definition of sexual intercourse should be broadened to include the unwanted penetration of the body *by an organ or an object* to ensure that situations in which objects other than bodily organs are used to commit the offence are included and to ensure that victims are protected from all forms of rape.

As guaranteed by Nepal's Interim Constitution Article 13, the right to equality before the law and in line with recent developments in Indian law,¹ we further recommend the inclusion of a specific section stating that consensual same sex intercourse is not to be an offence under this section. This amended section is designed to replace S227 (Prevention to Unnatural Sex) of the Code to ensures that consenting adults of the same sex are not falsely prosecuted.

Consent

The current definition of what does *not* amount to consent is informative and a welcome addition to the law; however, it still raises concerns about the level of physical resistance a victim must show to prove 'lack of consent'. 'Lack of consent' has often been interpreted by courts across the world to require the victim to physically defend himself/herself during the commission of the crime. We submit that placing an onus on the defendant to prove that he/she took reasonable steps to ensure the victim's *unequivocal and voluntary consent* to the act would minimize the re-victimization of the complainant by reversing

¹ On 2 July 2009 the Delhi High Court decriminalized homosexual intercourse between consenting adults and found that a provision that criminalized sexual activity "against the order of nature" (Section 377 of the Indian Penal Code) to be in violation the fundamental right to life and liberty and the right to equality as guaranteed by the Constitution of India: *Kusum Ingots v. Union of India*, (2004) 6 SCC 254.

the onus of proof in relation to the element of consent; this is in line with the practices recommended in the UN Report on Good Practices in Legislation on Violence against Women.²

Marital Rape

We recommend that the draft Penal Code fully comply with the 2002 decision of the Supreme Court of Nepal in the case of *Forum for Women, Law and Development v His Majesty's Government/Nepal* in which the court found that the failure to criminalize marital rape in the *Muluki Ain* was unconstitutional and contrary to the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Despite the enactment of the *Gender Equality Act*, which amended the *Muluki Ain* to criminalize marital rape, a concession still exists in the relative penalty provided for this crime versus any other adult rape. We recommend deleting this section and specifically including marital partner as a person who can be a victim under s220, as suggested above.

Penalty

In terms of penalty we recommend an increase in penalty for an adult rape to a minimum of 5 years up to maximum 15 years to reflect the seriousness of the crime and in line with international practice.³ We recommend providing a basic penalty for an offence of rape and provide for an additional penalty if certain aggravating circumstances exist. Such aggravating circumstances may include the age of the victim; the relationship of the perpetrator and victim; the use or threat of violence; the presence of multiple perpetrators; the perpetrator commits rape with knowledge that he himself is suffering from HIV positive or other sexually transmittable disease; the offender knew, or ought to have known, that the victim was pregnant, disabled or suffering from any physical or mental illness; or grave physical or mental consequences of the attack on the victim.

The closed categories of aggravating circumstances included in the current draft legislation are limited; by amending the draft to give some examples of aggravating circumstances, but not limiting them, will allow judges to take into account the entirety of the circumstances of the case in deciding penalty.

s221 - Prohibition to Commit Incest:

Definition of Incest

²Report on Good Practices in Legislation on Violence against Women, Expert group meeting organized by United Nations Division for the Advancement of Women, United Nations Office on Drugs and Crime, United Nations Office at Vienna, Austria (26 to 28 May 2008), available at [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20\(final%2011.11.08\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20(final%2011.11.08).pdf) at page 28.

³For example, Maximum Imprisonment Penalty Range: life imprisonment (minimum penalty 7 years) [S376 Indian Penal Code]; 15 - 20 years [S5.2.1 Australian Model Criminal Code]; 15 years to life [French Penal Code]; 10-15 years [Norwegian Penal Code § 192].

Currently, this section only protects female victims and we recommend making this section gender-neutral to recognize that incest can involve both male and female victims. The definitions of incestuous family relationships [at S221(2)] include many male and third gender persons, who may also be involved as victims as well as perpetrators.

The section: "...such woman shall also not let incest happen" does not clearly articulate the elements of an offence of a person "not rejecting" an incestuous sexual encounter. We recommend the amendment of the wording of this section to remove the current ambiguity in relation to this element of the offence:

*s221(1): A **person** who **knowingly and consensually** has sexual intercourse with **any person to whom marriage is prohibited** due to the degree of relationship according to the existing tradition practice shall commit the offence of incest.*

Penalty for Incest

We further recommend that the definition of incestuous relationships at S221(2) be made gender-neutral to ensure that any perpetrator of incest shall not be protected due to a failure by of the legislation to recognize the possibility of same sex incest.

s225 - Prohibition to commit Sexual Harassment

This section encompasses a wide range of threatening sexual behaviour and we submit it would be more appropriate to separate it into to 2 offences. Sexual assault has the potential to be more harmful than the acts comprising sexual harassment - though the criminalization of sexual harassment is necessary and encouraging to see - therefore we recommend the separation of the 2 crimes, as shown below:

s225 - Prohibition to commit sexual assault:

(1) Any person who sexual assaults another shall be guilty of an offence and shall be liable to a term of 2 to 10 years imprisonment.

'Sexual assault' in this part means violating the bodily integrity of another person by means of sexual conduct, this includes, but is not limited to, touching or attempting to touch any sensitive organ of a person, opening or attempting to open his/her inner dress, obstructing or attempting to obstruct to change his/her inner dress, forcing a person to touch or to hold a sexual organ, asking a person to do so.

s226 - Prohibition to commit sexual harassment:

(1) Any person who sexual harasses another shall be guilty of an offence and liable to up to 3 years imprisonment.

'Sexual harassment' in this part means unwelcome sexually-determined behaviour, which includes, but it not limited to, direct or indirect physical conduct and advances; a demand or request for sexual favors; sexually colored remarks and/or use of sexually vulgar words; displaying sexually explicit pictures, posters or graffiti; and any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

We further submit that the mental element of ‘with an intention to have sexual intercourse;’ in the current draft is unnecessarily limiting in the definition and may, in fact, amount to attempted rape. Our recommendation allows the court to grade the crimes of sexual assault and sexual harassment in line with Nepali and international standards.

s226 - Prohibition to sexually abuse children

The limited definition of a child in this section, in terms of being less than 10 years old, is in clear contravention of Nepal’s international obligations under the Convention on the Rights of the Child⁴ and contrary to the Recommendation 89(a) of the Committee on the Rights of the Child that GoN should ‘enact appropriate legislation that ensure protection from sexual abuse and exploitation for boys and girls under 18 years.’⁵ We encourage the amendment of the definition of a child in line with the Committee’s recommendation.

The penalty for sexual abuse of children (less than 2 years) is glaringly inadequate considering the vulnerability of children and the devastating impact such behaviour can have on a child and their development. Persistent sexual exploitation of children is a particularly heinous crime; it is Nepal’s legal duty to protect children from exploitation and to deter perpetrators with an appropriately strict penalty.

s227 - Prevention to have unnatural sex:

We infer that section 227 (1)&(2) refer to homosexual rape, which, as per our recommendation in relation to the definition of rape above, should be included as an offence at S220. The ambiguous drafting may offend the principle of legality and may therefore lead to acquittals in cases where rape victims are of the same sex as the perpetrator. To ensure consistent treatment and access to justice of all victims of sexual offences, we recommend the inclusion of homosexual rape in the main definition at S220 and the deletion of S227 (1)&(2).

s228 - Compensation

As recommended above in relation to victims of enforced disappearances, we support the establishment of a Government-supported Victim Relief Compensation Scheme, once established, and the direct payment of compensation in the interim.

s229 - Limitation:

We concede that a 1 year limitation date for a majority of offences under this Chapter is an improvement on the current 35 day limitation; however, factors of intimidation, shame and fear may still have an impact on the victim’s ability to make a complaint within that time.⁶ As such, we submit

⁴ On 14 September 1990 Nepal ratified the United Nations Convention on the Rights of the Child (Dec. 12, 1989, UN General Assembly Document A/RES/44/25).

⁵ Concluding Observations of the Committee on the Rights of the Child, Nepal, U.N. Doc. CRC/C/15/Add.260 (2005) available at <<http://www1.umn.edu/humanrts/crc/nepal2005.html>>.

⁶ Across the Lines - The Impact of Nepal’s Conflict on Women’ Advocacy Forum/International Center for Transitional Justice December 2010, available at

that a general discretion permitting the complaint to be heard at the discretion of the court, as is available in cases of enforced disappearances, is also necessary taking into account the factors above.

We note that laying a complaint in relation to the sexual abuse of children must be made within 3 months of the offence occurring. A child is especially vulnerable to coercion and intimidation, is unlikely to be aware of her/his rights at law and therefore may be unable to seek help within 3 months. We recommend, in line with international law, that the beginning of a limitation period for a child to complain begin once they attain majority, i.e. 18years.

We further recommend that the limitation period be consistent with other offences under this section (1 year); 3 months is inadequate and contrary to Nepal's international obligations referred to above.

Chapter 11 - Provisions relating to Marriage

s175 - Prevention to do child marriage

UNICEF has documented that 'It[child marriage] represents perhaps the most prevalent form of sexual abuse and exploitation of girls.'⁷ As such we submit that the penalty is grossly inadequate.

Further, the term "causes" needs to be defined to include the guardian(s) who have a duty of care to protect the child. It may be interpreted narrowly here to include only the person performing the marriage ceremony.

Consistent with the Preliminary OHCHR Comment released in July 2010, we recommend that this section provide for compensation and counseling to be available to the child victim.

s176 - Prevention to transact in the marriage

We are encouraged to see this new legislation and suggest a minor amendment to prevent any ambiguity arising as to whether a person's behaviour was both inhumane and degrading. Sub-section (3) prohibits any 'inhumane and degrading behaviour' against a bride for non-payment of dowry, we recommend making this statement in the alternative: '*inhumane and/or degrading behaviour*'.

s178 - Marriage Offences Limitation:

As per our comments on the limitation for offences concerning sexual abuse of children, the limitation period under this section is inadequate and violates Nepal's legal obligations to Nepali children. Victims of child marriage in particular are unlikely to be aware of their right to pursue criminal charges against their spouse, nor know where to go for legal assistance and may be subject to undue pressure from both families to keep silent about the relationship. In cases of adult complainants, the social pressures on victims of marriage-related crimes to stay silent is also strong; in light of these factors we submit that the limitation period should be extended to 1 year from the date of the offence or the complainant obtaining majority.

⁷ UNICEF, Child Protection Information Sheet, Child Marriage, May 2006
<http://www.unicef.org/protection/files/Child_Marriage.pdf> accessed on 22/12/10.

Miscellaneous Provisions

s170 - Prevention to commit inhuman treatment

This protection is particularly welcome as women who come forward with complaints of sexual violence are often subject to social exclusion and stigma, which deters victims from making complaints. It is also encouraging to see a nominally increased penalty for public servants who engage in this type of behaviour. This is a good example of the GoN's sensitivity to vulnerability of victims of sexual violence.

s120 - Prohibition to misdemeanors

We recommend this section be deleted as we submit it is incorporated in our recommendation of section regarding sexual harassment above.

DRAFT CRIMINAL PROCEDURE CODE

s4 – Duty to Give Information or Application Relating to Commission of an Offence-

We recommend the imposition of a positive onus on Police/CDOs to register and investigate any complaint submitted to police and that the Government Attorney (GA) should hold the decision-making power and political responsibility in relation to non-investigation of complaints. We make this recommendation in light of the number of mandamus petitions lodged to the Supreme Court by AF and others seeking a writ to have the Police register complaints and begin investigations, and the consequent misuse of judicial time and resources.

Further, the Criminal Procedure Code provides a mechanism whereby erroneous, false or fictitious complaints need not be investigated on the advice of the GA: S10(1); S8(8). The draft Criminal Code further provides a prohibition on creating false evidence at S88, with a penalty providing for up to 5 years imprisonment. The deterrent against presenting false evidence, combined with the mechanism by which the GA can decline to investigate a complaint, efficiently provides protection against the police potentially wasting time and resources in investigating baseless complaints. We recommend the following insertion after sub-section (5) of section 4:

Police are to Register All FIRs and Conduct a Preliminary Investigation

(6)An authorized government official, including a Chief District Officer, must register any complaint made under this section. If an authorized government official refuses to register a complaint, he/she must provide reasons for the refusal to file the complainant in writing; any person who fails to comply with this section shall be subject to departmental action on the recommendation of the Attorney General to the concerned office.

We also recommend the removal of proviso in S4(3), which permits a delay in investigating postal complaints, or complaints 'by proxy' until they can be verified in person. The S4(3) proviso is unduly restrictive and discriminatory towards persons residing in remote communities and those without means of transport. Persons in the deepest poverty are often those with the least access to justice; we therefore recommend removing this provision in order to achieve equality before the law.

s5 - Complaint Procedure in case of refusal to record FIR

We are pleased that there is provision made for complaints in case of a refusal to register an FIR. In order to further address the issues of accountability to victims in terms of registering complaints above, we recommend the following strengthening measures:

- empowering only the GA with the decision of whether to investigate and prosecute;
- requiring that the GA be accountable in writing to the complainant;

- providing more significant penalties for government representatives who fail to comply with procedural law, to enable the legislation to lead the way for cultural change in the law enforcement area.

In a case where the GA recommends further action pursuant to S5(2), the police office must be legally obliged to follow the directive pursuant to S5(3). We recommend the addition of the following:

S5(2): "...and an investigating official from the concerned police station shall be bound to follow the lawful direction of the Government Attorney issued pursuant to sub-section (2)."

S5(3): "In cases in which the Government Attorney recommends no further action, the Government Attorney is to provide written reasons for declining to investigate to the FIR, including a list of evidence provided by the investigating officer; departmental action shall be imposed on any person failing to comply with the above procedure."

Complaints to the Chief District Officer

In relation to the procedure for complaints of Schedule 2 offences to the administrative offices or the Chief District Officer ("CDO"), the CDO retains a discretion to decline to register complaints: S5(5). In accordance with our comments above, we submit that all complaints should be registered by the relevant office; and in the event that any refusal is made, recourse to the GA (not the CDO or Home Ministry), should be available. We make this recommendation to create a more independent procedure and to cross check the decision-making of the CDO by a legal practitioner in the GA.

Refusal to Investigate on Grounds of Alternative Justice Mechanism Available

During the course of AF's work we have received information from a variety of sources that the debates relating to the establishment of the Truth and Reconciliation Commission and Disappearances Commission has been invoked by Police as a reason not to accept an FIR, even though these bodies have not been formally established nor will they have the same prosecutorial competence once established.

This rationale for refusal to investigate has been rejected by the Supreme Court of Nepal on several occasions. In addition, the aforementioned Commissions are not currently operational; further, they do not set out any requirement for the competence, independence, impartiality of the members of the commissions, nor do they include any provision for the protection of victims and witnesses. In addition, they will not have prosecutorial powers. We therefore seek the insertion of a specific section excluding this as a ground to refuse to investigate.

s10 – Sending of Preliminary Report

We are encouraged to see that a 3-day time limit for an investigating officer to send the preliminary report to the GA has been considered and implemented.

We are further encouraged to see that what constitutes "preliminary investigation" is defined; the set criteria on the measures that the police should reasonably take in terms of investigation is welcomed from the perspective of victims. AF has been compelled to file mandamus petitions due to a failure by police to investigate; therefore we recommend the adoption of a provision requiring the investigating official to carry out the preliminary investigation *in good faith and with due diligence*; with

departmental action as a penalty to ensure that investigations are thoroughly carried out in a timely manner.

Onus on Police to Keep Victim's Informed

To place Nepal at the forefront of victim's right legislation, and to supersede current international practice in investigations,⁸ we submit that placing a legal onus on the investigating officer to keep complainant(s) informed of progress of the case should be added.

s12 – Special Investigative Teams

Currently the draft legislation gives discretion to the head of Police/Superior Authority to choose whether to investigate a complaint against one of their own staff or not. Granting the Head of Police the discretion to maintain control of an investigation that may be a conflict of interest is not appropriate as it leads to a strong perception of bias and is insufficient to protect victims of offences that are carried out by Police or other government authorities.

We submit that a special investigative team should be established and utilized wherever there is a conflict of interest, i.e. where there is a private or professional relationship between the individual(s) under investigation and those carrying out the investigation, to ensure independent and thorough investigations are carried out and public confidence in the justice system is maintained.

To practically ensure that the teams can function effectively, we recommend a sub-section be added mandating the co-operation of government officials with special investigating authorities.

S53(4) – Government Officials' Immunity to Prosecution

Qualified immunity for government officials acting *in good faith* in the course of their official duties is generally accepted. However, this provision as currently drafted provides an impermissible degree of immunity for government official and essentially provides a "loophole" for officials to mask any illegal behaviour. Government officials are not above the law and should not be able to hide behind the required permission of GoN to avoid prosecution for illegal acts. We suggest that the phrase "without written sanction of Nepal Government" be replaced by an objective standard:

"No government employee to be tried for any act done by him in the course of discharging his official duty insofar as his/her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

This makes the conduct of the government official, even whilst in the course of his/her duty, subject to the laws of Nepal, as well as the constitutional rights of other citizens. The jurisdictional question turns on whether a hypothetical reasonable person, in the government official's position, would have known

⁸ Articles 7.2 and 7.3 of the Code of Practice for Victims of Crime (Crown Prosecution Service Operational Guidance) (UK) provide that victims must be directly informed of important decisions during an investigation and prosecution; however, it is a guide only and not legally enforceable. In Australia, the *Victims' Charter Act 2006* is an Act governing the treatment of victims by the police, the Office of Public Prosecutions and victim support services; the provisions of which are legally enforceable and include the right to be kept informed.

that his/her actions violated clearly established law. The phrasing of the immunity in this way ensures that the rights of citizens are protected, while still allowing officials to perform public duties.

We note that there can be no circumstance in which a government official's involvement in disappearance of persons can be considered a lawful exercise of authority.

We further recommend that an explicit section be inserted stating that no written sanction of GoN is necessary to investigate or prosecute a complaint made against a government employee under this Code.

s114 – Witness Protection Measures

AF and REDRESS are pleased that the GoN has taken measures to ensure witness attendance through providing means of protection. AF has anecdotal evidence that often intimidation of witnesses occurs after the making of the complaint, but before giving evidence. Witness protection measures need to take this into account and applications for specific forms of protection should be able to be made at the earliest stage of proceedings.

We acknowledge the insight and initiative of the legislature for the inclusion of in-camera proceedings and prohibition of publishing the names of vulnerable witnesses, including the complainant [S178 CPC]; and the ability to give evidence via audio-visual recording [S179 CPC]. We further suggest listing protective measures to ensure that law enforcement officials and judges are aware of the range of protections available, such as: the provision of safe houses for victims and their families; the introduction of restraining (protection) orders preventing the suspect contacting the victim or their family (if suspect on bail); prosecute persons who threaten or intimidate complainants⁹; accompaniment by a friend or victim-support person at the time of giving evidence; the option to give evidence without facing the defendant, i.e. in a witness protection box (physically separated from defendant); and providing separate waiting areas for complainants and police escorts for complainants, if required.

Complainant's Right to Information

The right to information is important to victims. We therefore recommend placing an onus on investigating officials to make the range of protections known to victims, so that they can make any necessary or desirable requests.

s116 - Not Withdrawal of the Case:

Chapter 16 (Disappearance of Persons) offences are able to be withdrawn pursuant to the exceptions provided for in sub-section(2)(a); in light of the seriousness of enforced disappearances signified by their definition as a crime against humanity, as well as the necessary element of State agents as perpetrators of this crime, it is inappropriate to give the discretion to other State agents (GA) to decline to prosecute such a case. We therefore recommend removing Chapter 16 (Disappearance of Persons) from sub-section(2)(a).

⁹S170 draft Criminal Code: 'Prevention to Commit Inhumane Treatment.'

Suggested Further Provision - Duty to Ensure Accurate Information is Kept

We strongly urge adding the following provision, which clearly outlines what information should be kept and disseminated in terms of detained persons, and provides for sanctions, including fines, against individuals/police units who fail to do so. This provision is particularly pertinent to protecting victims of unlawful detention, enforced disappearances and torture and provides a clear standard of information to be kept in relation to detainees. We submit that such a provision would be a strong protective and preventative measure against any future crimes of disappearances.

Proposed to be inserted after S13 – Power to Apprehend and Take into Custody:

s13A – Provision to ensure accurate information kept and disseminated

(1) The officer in charge of any State agency entrusted with arrest and detention of any person shall ensure:

a) the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose; and

b) guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:

i) The authority that ordered the deprivation of liberty;

ii) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;

iii) The authority responsible for supervising the deprivation of liberty;

iv) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;

v) The date, time and place of release;

vi) Elements relating to the state of health of the person deprived of liberty;

vii) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.

(2) A failure to comply with sub section (1) shall be an offence, punishable by up to 5 years imprisonment and a fine. Any government agent or employee shall also be liable to departmental action for a failure to comply with sub section (1).

(3) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate shall be an offence.

(4) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met shall be an offence.

(5) Any person committing an offence pursuant to sub sections (3) or (4) above, shall be punished by up to 5 years imprisonment and a fine, and shall also be liable to departmental action.

DRAFT SENTENCING BILL

Victim Relief Compensation Fund

The Victim Relief Compensation Fund [s48] should be established as a matter of priority to ensure that victims are not re-traumatized by having to pursue compensation through the courts.

Consistency between Sentencing Considerations

‘Chapter 3 - Circumstances in which seriousness of offence increase and decrease’

We recommend the re-insertion of Chapter 3 from the previous draft of the Sentencing Bill (2066BS) to ensure that victims have a transparent sentencing procedure and so that convicted persons are sentenced consistently in accordance with established principles.

Penalties for Sexual Offences

Penalties for rape are significant in the draft Bill; other sexual offences should have the similarly strong penalties to ensure consistent deterrence of offenders.