



SOMALILAND RAPE LAW

POLICY BRIEF

BACKGROUND

The Somaliland Rape Law Bill (2014) is a significant step in the fight against sexual violence in Somaliland. Deliberation of the proposed law provides opportunities to enrich the law with best practices and highlights the importance of ending impunity for sexual violence.

When considering this draft Bill it is important to consider the shortcomings of the current legal framework in respect of sexual violence and what the draft Bill seeks to cure. The Somaliland Penal Code already prohibits rape,¹ yet sexual violence is still perpetrated and relatively few perpetrators are brought to justice. To be successful, the new law must address the challenges to justice for victims of rape in Somaliland as well as addressing gaps in the current legislation.

The draft Bill includes a number of important provisions; for example, obtaining compensation for victims of sexual violence, combining principles of retributive and restorative justice and establishing an “anti-rape committee” to co-ordinate administration of justice under the proposed law. However, there is a lack of clarity over how the new law will relate to the existing Penal Code, and certain provisions are not wholly in accordance with international norms and best practice. For example, the draft Bill provides for pre-emptive action against a potential perpetrator. This is contrary to fundamental principles of legality and fairness.

Horizon Institute has reviewed the draft Bill article by article and hopes that its input will assist the drafting of this important law.

A schedule comprising of standardized forms to aid uniform evidence collection and treatment of victims of sexual violence is attached.

¹ Section 398 Penal Code of Somaliland

1. SHORT TITLE

The law proposed is referred to as the “Somaliland Rape Act”. This title should be widened to include other sexual offences such as defilement, sexual assault, attempted defilement and rape.

Recommendation

The title could be: **Sexual Offences Act**

2. DEFINITION

Under Article 2, the draft Bill defines various terms used throughout the Bill, including **aggravated rape**. Although a good start, at present the definition section does not define the specific elements that constitute rape. Certain definitions need augmentation for clarity while others need to be altogether replaced (Definition of Child as being under 15 years of age). There is need to better define violations that are not rape but are sexual crimes.

Currently, Article 32 of the draft Bill refers to “Existing laws”. There should be a more specific provision harmonizing the relationship between the proposed law and the Penal Code, giving the proposed law precedence over all laws relating to sexual offences. Furthermore, it will be necessary to ensure that the provisions in the draft Bill can be reconciled with Article 5 (2) of the Somaliland Constitution, which provides that all laws shall not be contrary to Sharia Law.

Recommendation

The proposed bill under the section on definitions should include:

Penetration: Partial or complete insertion of the *genital organs* of a person into the *genital organs* of another person. Article 4 (3) of the draft Bill mentions oral penetration in the case of child rape but it should not be limited to such cases.

Consent: To agree to and/or to give permission for an act to be done to oneself and the same can manifest in free will to participate in an act. Consent is not free or voluntary if obtained by force. It is important to note that children and persons with mental incapacity cannot consent to acts under this law.

Child: Any person UNDER the age of eighteen (18) years.

Adult: Any person OVER the age of eighteen (18) years.

Gang: Refers to two or more persons.

Gang rape can be defined as rape or defilement in association with another or others.

Indecent Act This makes specific reference to any unlawful intentional act done on purpose with the result that it causes any contact between the *genital organs* of a person, but does not include an act that causes penetration. It may also include exposure or display of any pornographic material to any person against his or her will.

Intermediary is a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker.

Person with mental disabilities means a person affected by any mental disability irrespective of its cause, whether temporary or permanent.

Sexual Offence constitutes any offence contained in the Act.

Vulnerable Witness means a child witness or a witness whose quality of evidence is likely to be diminished because they are suffering from a mental disability, fear or distress in connection with giving evidence at the trial.

Intentional and Unlawful Act is an intentional and unlawful act if it is committed in any coercive circumstance, under false pretences or by fraudulent means; or in respect of a person who is incapable of appreciating the nature of an act which causes the offences (persons with mental disabilities).

The crime of **Aggravated Rape** should be listed in section three of the Bill under Offences, rather than Definitions.

Under Article 2, the draft Bill includes "**Circumstances of aggravation**", similar to "aggravating factors" in many jurisdictions. The following additional circumstances or factors could be added to the current list:

- abduction;
- detention;
- the offender is aware that he is suffering from a sexually transmitted infection;
- abuse of a position of trust; and
- age of the victim.²

With respect to "abuse of trust", the current Penal Code provides for abuse of authority by a public officer.³ However, this should be extended to encompass other situations of "abuse of trust". Under Article 2 of the draft Bill, it is worth inserting the following to take into account abuse of trust as an aggravating circumstance:

Position of trust is where a person (A) is in a position of trust in relation to another person (B), who is under eighteen (18) years. This includes situations where B is either: detained in an institution; a resident of a care home; in a hospital or clinic; a resident of a children's home; attends an education institution; or where A is appointed B's guardian.

² See for example, the UK Sexual Offences Act 2003, the Malaysian Penal Code, sections 375 and 376.

³ Somaliland Penal Code, Article 398 (3).

It is also worth considering whether the Bill should include reference to rape in marriage, and incestuous rape.

Under Article 2 of the draft Bill, the definition of “**Sexual abuse**” could further specify that “the abuse may be physical, psychological or emotional”.

Moreover, the definition of “**Perpetrator**” in Article 2 of the Bill does not appear to fit with other provisions and could be simplified. Article 2 provides that “**Perpetrator** means any person who is or has been in a domestic relationship with a victim and who has committed or allegedly committed an act of domestic violence against the victim.” The following definition is recommended:

Perpetrator is a person who has committed any of the offences contained in this Act.

3. **OBJECTIVES OF THE ACT**

The draft Bill states the rationale for the law in this section. It lays out the reasons for penalizing rape, providing adequate protection for the victims of rape, preventing rape and enforcing criminal convictions. A progressive contribution of the draft Bill is the introduction of civil liabilities for perpetrators of rape.

There is, however, a need to explicitly address obstacles to accessing justice for victims, such as traditional justice mechanisms and the intervention of elders who conclude private agreements outside the legal framework.

Recommendation

The draft Bill should state its objective: sexual offences are criminal acts that must be addressed by the formal justice system. Attempts to remove or divert sexual offences cases to traditional dispute resolution mechanisms should be a criminal offence and should be included in the draft Bill. Interference in the administration of justice is also something that should be included in the Penal Code.

The draft Bill should widen the category of sexual offences punishable in law by explicitly recognizing that men and women, boys and girls can both commit and be victims of sexual offences.

4. **OFFENCES AND PUNISHMENT OF RAPE**

This section lists the various offences under the draft Bill and the penalties attached to them.

At present, the draft Bill does not adequately define sexual offences. In addition, the draft Bill should explicitly address the gravity of the offence according to the age of the victim and nature of violation.

Recommendation

Rape A person commits the offence of rape if, he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs. The other person does not consent to the penetration, the consent is obtained by force, coercion or intimidation of any kind. A penalty should be prescribed for this offence.

Attempted rape should be defined as trying to rape someone. A penalty should be prescribed for this offence.

Sexual Assault should be defined as a person intentionally penetrating the genital organs of another person, with any body part or object capable of causing penetration, including but not limited to a stick, a bottle, among others. A penalty for this offence should be prescribed.

Defilement should be defined as the act of having sexual intercourse with a child below the age of 18. Importantly, there can be no consent by a child to a sexual act as the child is deemed to be incapable of giving such consent. The penalty for these proposed offences should vary depending on the age of the child.

The sentence for defilement should depend on the age of the child, for example in the Kenyan Sexual offence Act:

*“Children below 11 years – Life imprisonment.
Children between 12 – 15 – Twenty (20) years in jail or more.
Children between 16-18 years – fifteen (15) years or more.”*

Proposed defence

The proposed law should allow a defence of mistaken belief where an alleged perpetrator indicates s/he was misled by the child, and believed that they were over 18 years old. These circumstances will only amount to a defence if the perpetrator proves that s/he took all reasonable measures to ascertain the child’s age. This defence will not be available should the accused be related to the child.

Where the matter involves two children, then it should be addressed through counselling and/or a children’s rehabilitation institution.

Attempted Defilement should attract a sentence of not less than ten (10) years in jail.

Gang Rape is when two or more people rape an adult or defile a child. The penalty ranges from not less than fifteen (15) years to imprisonment for life. Notably any person will be *individually* charged with the offence of rape as well as being charged *together* with the rest of the offenders for the offence of gang rape.

Indecent Acts with a Child (proposed to be defined as in Article 2) recommend a sentence for indecent act with a child, children’s rehabilitation centre where the perpetrator is a child.

Indecent Act with an Adult (Defined in Article 2) recommend a sentence for indecent assault with an adult.

5. PROCEDURE FOR REPORTING TO POLICE UNIT

This section seeks to standardize the process of reporting a sexual offence. It lists the steps that the police officer is required to take on being notified of the violation. It makes it mandatory to report the violation to the police station and requires the police officer to obtain certain information from the victim.

Recommendation

A standard protocol and procedure should guide the process of handling sexual offences cases and should be attached as a schedule to the draft Bill.

The police officer should record any visible signs of physical injuries on the victim. They should not physically examine victims themselves, but ensure that s/he receives a medical examination by a doctor or qualified nurse.

Police officers should provide same-sex officers to interview victims.

The use of intermediaries should be allowed, especially for vulnerable victims.

The proposed Anti-Rape Committee should be responsible for regular review of the proposed police protocols in order to make amendments as necessary. (See section on Anti-rape Committee).

6. COURT PROCEEDINGS

This section outlines the pre-trial process of a sexual offences case. It requires the police officer to inform the victim of her right to legal representation throughout the legal process. This is an important step towards justice for the victim.

Recommendation

The law should state clearly that it is mandatory for the State to provide free legal representation to a victim of a sexual offence.

The proposed law could also provide that a lawyer should be drawn from the national bar association and that costs of the legal representation would be undertaken by the State, perhaps from the consolidated fund.

7. TRIAL PROCEDURE

This section requires that a sexual offences trial be expedited and the victim be treated with sensitivity. This includes limiting interaction between the victim and the perpetrator. Further protection measures are, however, possible.

Article 197(d) of the Criminal Procedure Code states that "when a man is prosecuted for: i) a crime or attempted crime of sexual violence; or ii) a crime or attempted crime against modesty or sexual honour on a woman over 16 years of age, evidence may be given to show that the woman was of generally immoral character." The new law should expressly override this provision and prevent the prosecution from using the character of a victim as a defence.

Recommendation

The use of intermediaries should be available, particularly for children. The role of the intermediary is subject to the court's direction, however if the court denies an intermediary's role, it will have to give reasons. The court shall not base a conviction on the unsupported evidence of an intermediary.

The victim's evidence in cases of sexual violence should always be heard *in camera* (in private) unless the victim requests a public hearing. The court should direct that any person who is not necessary to the proceedings be excluded from the hearing.

Screens should be used to shield witnesses from the defendant during the proceedings. This is particularly important for children and vulnerable victims.

The law should include a provision that the prosecution shall not question a witness or adduce evidence where the purpose is to establish or elicit material for impugning his or her credibility in sexual offences proceedings.

PROTECTION ORDER

Article 9 of the draft Bill provides for a Protection Order which authorizes the court to issue an order preventing the commission of a sexual offence or further endangerment of a victim of a sexual offence. This is contrary to principles of fairness and due process – a person should not be held responsible for an act s/he has not committed.

Recommendation

This section of the proposed law should be deleted from the draft Bill.

The court should be able, at any time to grant an order for the treatment of a victim of sexual offence. The victim should be able to access treatment in any public hospital or institution and the expenses should be borne by the State. Such an application can be made at the pre-trial, trial or end of trial stage.

8. ESTABLISHMENT OF AN ANTI-RAPE COMMITTEE

The Anti-Rape Committee is proposed to monitor all relevant institutions involved in a sexual offence case. The committee should co-ordinate and facilitate access to justice for the victim. The name of this committee should also be more representative of the mandate of this committee.

Recommendation

The committee could be re-named the “**Sexual Offences Task Force**” since its primary duty is to ensure the successful implementation of the proposed law.

The committee should coordinate access to justice for victims of sexual violence through coordination of the various sectors involved in the administration of justice for victims.

The Committees activities shall include:

- Regularly assessing the performance of stakeholders involved in the delivery of justice for victims of sexual offences, establishing the gaps and developing a policy framework to ensure good quality and uniform treatment, including the treatment and care of victims.

-Ensure consistency between the Act and other existing laws, policies regulations and customs.

-Undertake public education and sensitization campaigns on sexual offences to fulfil the mandate and promote the objectives of the proposed law.

-Develop monitoring and evaluation mechanisms to gauge effectiveness in delivering the proposed Sexual Offences Act-mandated protection and support.

10. SPECIAL DUTIES OF OFFICERS OF RAPE OFFENCES

This section sets out the specific duties an investigating officer ought to undertake in a case of sexual violation. The section, however, does not define the special duties officer or department dedicated to offences of this nature

Recommendation

The Anti-Rape Committee (Sexual Offences Task Force) should propose the creation of a specific department to address sexual violations. The department can be created administratively and can consist of the Anti-rape Committee working in conjunction with the police. Specialized training should be provided for officers in this department.

General Comments

1. The draft Bill should include standardized forms to ensure that evidence collection is regulated and thorough. (A sample post rape care attached hereto as Annex 1)
2. The proposed law can institutionalize the ‘one-stop centre’ model where police officers are seconded to Baahi Kob to work in collaboration with the medical profession, or social workers are seconded to a police station to work with the police on sexual offences cases.

3. Guidelines should be developed by the Anti-Rape Committee (Sexual Offences Task Force) to facilitate the medical management of sexual violence in all health facilities. The guidelines should allow for trained (accredited) nurses to also fill in the post rape care forms.
4. Working with the Chief Justice and the Anti-Rape Committee (Sexual Offences Task Force), practice guidelines should be developed for judges on how to deal with sexual offences cases.
5. The recommended fund for victims of sexual offences should be linked to the consolidated national fund to ensure inclusion in the national budget.