

THE SEXUAL OFFENCES BILL
(No. VI of 2007)

Explanatory Memorandum

1. The object of the Bill is to provide for further and better provisions for sexual offences. In that context, a new definition of the offence of rape is provided and new categories of offences of sexual assaults are created in order to cover various acts of sexual perversions committed by offenders.
2. The Bill pays particular attention to persons under sixteen, as well as specified persons, in other words persons having close blood relationship or living under the same roof, or those who are mentally handicapped. Harsher penalties for a term of up to 45 years and 60 years of penal servitude are provided in respect of offences involving those persons.
3. The Bill also provides for a term of penal servitude of up to 60 years where aggravating circumstances exist, for example where –
 - (i) there has been a “gang rape”;
 - (ii) death has resulted, or where torture of the victim has been committed;
 - (iii) the victim is a person with particular vulnerability, such as mental deficiency or pregnancy;
 - (iv) the offence involves the use of offensive weapon;
4. Specific provisions have been made to cater for offences of sexual touching, engaging in sexual activity in presence of a child and causing a child to watch a sexual act.
5. It shall no longer be possible to disclose to members of the public whether by publication or broadcast, the identity of the person against whom an offence is alleged to have been committed.
6. The Bill also creates the offence of false declaration of the commission of a sexual offence and the offender is amenable to justice both when he takes the initiative of making the declaration, or where he makes the declaration in the course of an interrogation by the police or any other public officer in the course of an investigation.
7. The Bill also provides that henceforth a trial for an offence under the Act shall take place from day to day until the hearing is over.

8. The Bill also gives the Intermediate Court jurisdiction to inflict the penalties of 45 years and 60 years referred to above.

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06 April 2007

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ARRANGEMENT OF CLAUSES

Clause

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A BILL

To make better provisions for the offences of rape and other sexual assaults and to create other sexual offences

ENACTED by the Parliament of Mauritius, as follows –

1. Short title

This Act may be cited as the Sexual Offences Act 2007.

PART I - PRELIMINARY

2. Interpretation

In this Act –

“image” means a moving or still image and includes an image produced by any means;

”specified person” –

- (a) means any person who in relation to an accused, comes within the prohibited degrees set out in articles 151, 152 and 153 of the Code Civil Mauricien;
- (b) includes –
 - (i) a stepchild or an adopted child, of whatever age, of the accused;
 - (ii) a person under the age of 18 whose custody or guardianship has been entrusted to the accused by virtue of any other enactment or of an order of a Court;
 - (iii) a person under the age of 18, other than the spouse of, and living under the same roof as the accused;
 - (iv) the child of whatever age of the partner of the accused;
 - (v) a mentally handicapped person.

“touching” includes –

- (a) touching with any part of the body, or with any object, or through anything;
- (b) touching amounting to penetration of the vagina, anus or mouth.

3. Definition of sexual

(1) For the purposes of this Act, penetration, touching, or any other activity is sexual if a reasonable person would consider that –

- (a) it is sexual in nature, irrespective of its circumstances or any person's purpose in relation to it; or
- (b) it is sexual because of its circumstances or any person's purpose in relation to it.

(2) Subsection (1) shall apply, in particular, for the purpose of ascertaining whether any activity referred to in section 15 and 16 is sexual.

4. Consent and presumptions and rebuttable presumptions

(1) A person consents if he agrees by choice, and has the freedom and capacity to make that choice.

(2) If in proceedings for an offence under sections 6(1), 7(1), 8(1), 9(1) and 13(1), it is proved -

- (a) that the accused did the relevant act;
- (b) that any of the circumstances specified in subsection (3) existed; and
- (c) that the accused knew that those circumstances existed,

the complainant is to be taken not to have consented to the relevant act, unless sufficient evidence is adduced to raise an issue as to whether the complainant consented, and the accused is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether the accused reasonably believed it.

(3) The circumstances referred to in subsection 2(b) and (c) are that –

- (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
- (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

- (c) the complainant was, and the accused was not, unlawfully detained at the time of the relevant act;
- (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;
- (e) because of the complainant's physical or mental disability, the complainant would not have been able at the time of the relevant act to communicate to the accused whether the complainant consented;
- (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(4) In subsection (3)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

5. Conclusive presumptions about consent

(1) If in proceedings for an offence under the sections referred to in section 4(2), it is proved that the accused did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed -

- (a) that the complainant did not consent to the relevant act; and
- (b) that the accused did not believe that the complainant consented to the relevant act.

(2) The circumstances referred to in subsection (1) are that –

- (a) the accused intentionally deceived the complainant as to the nature or purpose of the relevant act;
- (b) the accused intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

Part II – RAPE AND SEXUAL ASSAULT

6. Rape

(1) Any person who, without the consent of another person intentionally penetrates, with his penis, the vagina, anus or mouth of that other person, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 45 years.

(2) It shall be a sufficient defence to a prosecution under subsection (1) that the accused had reasonable cause to believe that the other person consented to the penetration.

7. Sexual assault by penetration

(1) Any person who, without the consent of another person, intentionally penetrates the vagina or anus of that other person with any part of his body or with any object, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 45 years.

(2) It shall be a sufficient defence to a prosecution for an offence under subsection (1), that the accused had reasonable cause to believe that the other person consented to the penetration.

8. Sexual assault

(1) Any person who, without the consent of another person, intentionally touches that other person sexually, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 15 years.

(2) It shall be a sufficient defence to a prosecution for an offence under subsection (1), that the accused had reasonable cause to believe that the other person consented to it.

9. Causing a person to engage in sexual activity without consent

(1) Any person who intentionally causes a second person, without that other person's consent, to engage in a sexual activity, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 45 years.

(2) It shall be a sufficient defence to a prosecution under subsection (1) that the accused had reasonable cause to believe that the second person consented to the activity.

(3) For the purposes of this section, a sexual activity involves –

- (a) penetration of the second person's vagina or anus;
- (b) penetration of second person's mouth with a third person's penis;
- (c) penetration of a third person's vagina or anus either with a part of the second person's body or by the second person with any object; or
- (d) penetration of a third person's mouth with the second person's penis.

10. Sexual penetration of a dead body

Any person who intentionally performs an act of penetration of any part of the body of a dead person with any part of his body, or with an object, in circumstances where the penetration is sexual, and he knew or was reckless that what was being penetrated was a dead body, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 15 years.

PART III – RAPE AND SEXUAL OFFENCES AGAINST CHILDREN UNDER 16 AND SPECIFIED PERSONS

11. Rape of person under 16

Any person who intentionally penetrates the vagina, anus or mouth of a person under the age of 16 with his penis, even with consent, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 45 years.

12. Sexual assault of person under 16 by penetration

Any person who intentionally penetrates the vagina, anus or mouth of a person under the age of 16 with any part of his body or with any object, even with consent, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 45 years.

13. Sexual assault on persons under 16 and under 12

(1) Any person who, without the consent of a person between the age of 12 and 16, intentionally touches that other person sexually, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 15 years.

(2) Any person who, even with the consent of a person under 12, intentionally touches that other person sexually, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 15 years.

14. Causing a person under 16 to engage in sexual activity

(1) Any person who intentionally causes a second person who is under the age of 16 to engage in a sexual activity, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 45 years.

(2) For the purposes of this section, a sexual activity involves –

- (a) penetration of the second person's vagina or anus;
- (b) penetration of the second person's mouth with a third person's penis;
- (c) penetration of a third person's vagina or anus with a part of the second person's body or by the second person with any object; or
- (d) penetration of a third person's mouth with the second person's penis.

15. Engaging in sexual activity in the presence of a child

Any person who intentionally engages in any sexual activity for the purpose of obtaining sexual gratification –

- (a) when a person under 16 is present; or
- (b) when a person under 16 is in a place or in a medium from which the first person can be observed, and that person knows or believes that the person under 16 is aware or intends that the person under 16 should be aware that he is engaging in it,

shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 15 years.

16. Causing a child to watch a sexual act

Any person who intentionally causes a person under 16 to watch a third person engaging in any sexual activity or to look an image of any person engaging in a sexual activity for the purpose of obtaining sexual gratification, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 15 years.

17. Defences under sections 10 to 13

It shall be a sufficient defence to any prosecution under sections 11, 12, 13, 14, 15 and 16 that the accused had reasonable cause to believe that the child was above the age of 12 or 16, as the case may be.

18. Sexual acts with specified persons

(1) Any person who commits an act in a manner provided for under either section 11 or 12 upon a specified person, or intentionally causes a specified person to engage in a sexual activity as defined in section 14(2), even with consent, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 60 years.

(2) Any person who, even with consent, intentionally touches a specified person sexually, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 15 years.

PART IV – CIRCUMSTANCES OF AGGRAVATION OF OFFENCES

19. Higher penalties in circumstances of aggravation

(1) The penalties for the offences under sections 6, 7, 9, 11, 12 and 14 shall be penal servitude for a term not exceeding 60 years where it is averred and proved that the offence has –

- (a) been committed with the assistance of another individual, whether acting as co-author or accomplice;
- (b) been committed by the use, or threat, of an offensive weapon;
- (c) been committed by a person who, in so doing, made an abuse of the authority conferred upon him by his functions;
- (d) resulted in the death of the victim;
- (e) been committed upon a person whose particular vulnerability, on account of his age, illness, disability, physical or mental deficiency, or her state of pregnancy, is apparent or known to the accused;
- (f) been preceded by an encounter between the victim and the accused as a result of the transmission to an indeterminate section of the public of a message by telecommunication or other electronic means; or
- (g) been preceded, accompanied or followed by torture in the nature of intentional severe pain or suffering, whether physical or mental.

(2) The penalties for the offences under sections 8 and 13 shall be penal servitude for a term not exceeding 25 years where it is averred and proved

that the crime has been committed in the circumstances specified in subsection (1)(a) to (d), (f) and (g).

PART V – MISCELLANEOUS

20. Jurisdiction

- (1) The Intermediate Court shall, notwithstanding –
- (a) section 113 of the Courts Act, have jurisdiction to try the offences, and inflict the penalties, provided under sections 6 to 16, 18 and 19;
 - (b) section 139 of the Criminal Procedure Act, have the power to order the sentences referred to in paragraph (a) to be served consecutively, provided that the aggregate does not exceed 60 years.

(2) A District Court shall, notwithstanding section 114 of the Courts Act and section 72 of the District and Intermediate Courts (Criminal Jurisdiction) Act, have jurisdiction to try the offences, and inflict the penalties, provided under sections 8, 10, 13, 15, 16 and 18(2).

(3) Notwithstanding any other enactment, prosecution for an offence under section 6, 7, 9, 11, 12, 14 or 18(1) may, at the sole discretion of the Director of Public Prosecutions, take place before a Judge without a jury where any of the aggravating circumstances referred to in section 19(1) is averred in the information.

(4) Notwithstanding any other enactment, the hearing of a trial for an offence under this Act shall take place from day to day until it is over, or it may be adjourned from time to time where it is necessary or expedient to do so.

21. Consent to prosecution

No prosecution shall be instituted under this Act except on an information filed by, or with the consent of, the Director of Public Prosecutions.

22. Identification of victim

(1) Where an allegation has been made, or court proceedings are being held, in relation to the alleged commission of an offence under this Act, no person shall publish, diffuse, reproduce, broadcast or disclose, by any means, particulars which lead, or are likely to lead, members of the public to identify the person against whom the offence is alleged to have been committed.

(2) For the purposes of this section, “particulars” includes the name, address, photograph and image of the person against whom the offence is alleged to have been committed.

(3) Any person who contravenes subsection (1) shall commit an offence and shall, on conviction, be liable to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding one year.

23. False declaration of sexual offence

Any person, whether of his own free will or in the course of an interview, who makes a false declaration to any public officer on duty that any person has committed an offence under this Act, shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 10 years.

24. Repeal and re-enactment

(1) Section 249 of the Criminal Code is repealed.

(2) Section 250 of the Criminal Code is repealed and replaced by the following section –

250. Bestiality

Any person who is guilty of the crime of bestiality shall be liable to penal servitude for a term not exceeding 5 years.

25. Consequential amendments

(1) The Courts Act is amended –

- (a) in section 85, in subsection (5), by deleting the words “for an offence of rape under section 249(1) of the Criminal Code,” and replacing them by the words “for an offence under section 6, 7, 9, 11, 12, 14 or 18(1) of the Sexual Offences Act 2007”;
- (b) in section 112, in paragraph (d), by deleting the words “249(1), (4) and (5)”;
- (c) in section 116, in paragraph (a), by deleting the words “249(1) and (4),” and adding after the words “Criminal Code”, the words “, and sections 6, 7, 9, 11, 12, 14 and 18(1) of the Sexual Offences Act 2007”;
- (d) in section 161, in the definition of “sexual offence case”, by deleting the words “rape, attempt upon chastity or illegal sexual intercourse in breach of section 249 of the Criminal

Code” and replacing them by the words “rape, sexual assault by penetration, sexual assault, causing a person to engage in sexual activity without consent, sexual penetration of a dead body, rape of person under 16, sexual assault of a person under 16 by penetration, sexual assault of a person under 16 and under 12, causing a person under 16 to engage in sexual activity, engaging in sexual activity in the presence of a child, causing a child to watch a sexual act and sexual act with a specified person, in breach of sections 6 to 16 and 18 of the Sexual Offences Act 2007, respectively”.

(2) The Criminal Procedure Act is amended –

(a) in the Third Schedule –

- (i) in the second and third columns, under the item “Criminal Code” by deleting respectively the words “section 249” and the words “rape, attempt upon chastity and illegal sexual intercourse”;
- (ii) by inserting after the item “Dangerous Drugs Act”, the following new item –

Sexual Offences Act 2007	Sections 6 to 16, 18 and 19	Rape, sexual assault by penetration, sexual assault, causing a person to engage in sexual activity without consent, sexual penetration of a dead body, rape of person under 16, sexual assault of person under 16 by penetration, sexual assault of a person under 16 and under 12, causing a person under 16 to engage in sexual activity, engaging in sexual activity in the presence of a child, causing a child to watch a sexual act and sexual act with a specified person
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(b) in the Fifth Schedule –

- (i) in paragraph (b), by deleting the words “249 (in respect of the offence of rape, where it is averred that the offence was committed by 2 or more individuals)”;
- (ii) by adding after paragraph (k), the following new paragraph –
 - (l) Sexual Offences Act 2007, sections 6, 7, 9, 11, 12, 14 or 18(1) with the aggravating circumstance of section 19(1);

(3) The Extradition Act is amended in the First Schedule by deleting items 6, 7 and 8 and replacing them by the following items –

- 6. rape, rape of person under 16 or rape of specified person
- 7. sexual assault by penetration, sexual assault of person under 16 by penetration or sexual assault of specified person by penetration
- 8. causing a person to engage in sexual activity without consent, causing a person under 16 to engage in sexual activity or causing a specified person to engage in a sexual activity.

26. Commencement

(1) Subject to subsection (2), this Act shall come into operation on a date to be fixed by Proclamation.

(2) Different dates may be fixed for the coming into operation of different sections of this Act.