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Legal Action Worldwide (LAW)

## **Briefing note on the Somalia Sexual Offences Bill (2018) and the proposed Sexual Intercourse Bill (2020)**

This briefing note sets out four key issues and concerns in relation to the proposed Sexual Intercourse Bill and provides three key recommendations. The note outlines the key differences between the Sexual Intercourse Bill and the Sexual Offences Bill. There are four annexes attached with more comprehensive information.

### **Executive Summary**

#### Background

In May 2018, the Council of Ministers adopted the Sexual Offences Bill<sup>1</sup> (SOB). In June 2018, the SOB was transmitted to the speaker of the Parliament, who was expected to table it before the Lower House for debate and adoption before Presidential assent. Despite repeated calls to bring the SOB to the floor of the House for debate, the Speaker has failed to do so, stalling discussion for over two years.

In a surprising turn of events the new Sexual Intercourse Bill (SIB), also known as the Penetration Bill, was tabled for consideration before Parliament on 8 August 2020. The contents of the proposed SIB raised concerns due to its retrogressive nature.

Given the long road walked by Somalis and civil society in advocating for the passage of a comprehensive sexual offences law, it is important that the impetus created in opposing the new retrogressive SIB is sustained and supported by factual and comprehensive information on the setbacks in the SIB.

#### Four Key Issues of Concern

**1. Reduction of conduct which can lead to criminal liability:** Criminal conduct which was recognised under the SOB has been significantly reduced under the SIB. Specifically:

- ❖ Omission of the age of consent;
- ❖ Consent assigned to family members rather than the individual;
- ❖ Legalisation of child marriage;
- ❖ Omission of the offence of sexual exploitation;
- ❖ Changes in the definition of rape from “non-consensual penetration into another’s anal or genital organ” in the SOB, to “direct and intentional sexual assault” in the SIB;
- ❖ Significant reductions in the types of admissible evidence.

See Annex I for further information.

**2. The criminalisation of conduct protected under international law:** The SIB criminalises conduct which is not criminalised under the SOB and which is protected under international human rights law. This directly infringes rights guaranteed under international law such as rights to liberty, freedom of expression and non-discrimination. These include restrictions on:

- ❖ Flirting;
- ❖ Dating; and
- ❖ Homosexuality.

See Annex II for further information.

**3. Removal of procedural safeguards:** Procedural safeguards provided under the SOB have been removed and amended under the SIB. In particular, the SIB:

- ❖ Removes provisions setting out the responsibilities and obligations of various criminal justice institutions to enforce the law;
- ❖ Reduces privacy rights of a survivor by allowing the introduction of their sexual history to evidence during trial;
- ❖ Reduces situations where a person's consent can be vitiated or invalidated.

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<sup>1</sup> Please see Annex 1 for full timeline of the drafting and adoption of the Sexual Offences Bill.

See Annex III for further information.

**4. Removal of Sentencing Guidelines:** The SIB removes all the sentencing provisions under the SOB. One of the key components of the SOB is that it provides modern sentencing options for the judiciary. These minimum and maximum sentences allow for increased accountability and standardised sentencing.

- ❖ The SIB specifies that sentencing/punishment should be in line with the Somali Penal Code and/or Shari'ah law which is the very issue that the SOB was drafted to overcome.

See Annex IV for further information.

#### Conclusion

The SIB represents a serious roll back on the rights of women and survivors of sexual violence. Equally concerning is the exposure to sexual violence that the SIB seeks to affirm against children. The removal of all the provisions that the SOB had introduced to protect children reveals the intention behind the drafting and presentation of SIB, which is simply to enable the continued violation of the rights of girls in Somalia - this must be resisted.

#### Recommendations

LAW has three key recommendations for all actors interested in the protection of individuals from sexual violence in Somalia:

- 1 Call upon Parliament to immediately withdraw the proposed SIB and table the SOB for approval.
- 2 Advocate about the harmful and prejudicial impact the SIB will have on the rights of women, girls, men and boys in Somalia.
- 3 Share these messages and support the petition calling for the withdrawal of the SIB, which can be found [here](#).

**Annex I: Comparative summary of substantive changes from SOB to SIB with relevant concerns**

Issue	SOB Provision	SIB Provision	Concern
<b>Age of Consent</b>	The age of consent is 18 years.	There is no age of consent.  An offence is committed if the victim does not have the mental capacity to understand the ‘essence of sex.’ <sup>2</sup>	The age of consent is removed. The standard is instead dependent on the victim’s mental/emotional intelligence.  This change is introduced to provide for the subsequent provisions that allow child marriage.
<b>Definition of a Child</b>	A child is defined as any person, whether male or female, below the age of 18 years.	The definition of a child is removed.	It can be deduced that the removal of the definition in the SIB is intended to create ambiguity, in order to facilitate the subsequent provisions that allow child marriage couched as ‘adolescent marriages.’
<b>Child Marriage</b>	Marriage restricted to those 18 years of age or older.  Those who facilitate child marriage incur criminal liability, with sentences ranging from five to fifteen years of imprisonment.	Article 26 titled Adolescent Marriage (Children), provides that under Islamic marriage law adolescent marriage is permissible, but that the marriage should be delayed until the young person is able to engage in sexual intercourse without physical injury. Anyone who has sexual intercourse with a person who is incapable under this definition is liable for causing injury which is the misdemeanor crime of "cruelty" under Shari'ah.	Child marriage is legal.  Marriageable age relies on physical maturity of the child rather than the age of maturity, 18 years, in the Constitution.  No marriageable age is provided in the SIB.  The SIB offends the Provisional Constitution that provides that a marriage shall not be legal without the free consent of both the man and the woman, or if either party has not reached the age of maturity (Article 28 (5)).  Those who facilitate child marriage will not be held accountable under the new law.  A person who marries a child will, at worst, be deemed to have committed a misdemeanor offence, which carries a light sentence under the SIB.
<b>Rape</b>	Definition of rape is “non-consensual penetration into another’s anal or genital organ.”	Definition of rape is “direct and intentional sexual assault.”  The definition also delineates sex as an act of intercourse between two people of the opposite sex, that entails insertion into the vagina.	A clear, precise and measurable definition under the SOB is replaced by less specific language in the SIB, increasing opportunity for misinterpretation.  The classification of intercourse as occurring only between persons of the opposite sex eliminates the possibility of rape that occurs through non-consensual penetration into the anal organs from being covered by the law. This provision will have the effect of excluding not only males who are raped, but also females who experience anal

<sup>2</sup> Potentially erroneous due to poor machine translation in source document.

			rape, from seeking redress under this law.
<b>Forced Marriage</b>	<p>A forced marriage is defined as a marriage without the consent of the other party.</p> <p>Participating in, facilitating, organising, or arranging a forced marriage is punishable by 5-7 years in prison on commission or 2-3 years in prison for attempting.</p>	<p>Forced marriage is defined as “forcibly marrying another person without the knowledge of his/her family.”</p> <p>A party who “assists” the defendant in forced marriage is equally criminally liable.</p> <p>No penalty is set for the crimes.<sup>3</sup></p>	<p>The definition is changed from “without an individual’s consent” under the SOB, to “forcibly, without knowledge of the family” under SIB.</p> <p>This can be interpreted as requiring active coercion on the part of the defendant, without the victim’s family’s approval, rather than a lack of consent on the part of the victim as under the SOB.</p> <p>The use of the word “assist” introduces ambiguity to the definition of third-party offenders under SIB, which is less clear than “participates, organizes or arranges” under SOB.</p>
<b>Abduction for Sexual Purposes</b>	<p>Components of the crime of “abduction for sexual slavery” are:</p> <ol style="list-style-type: none"> <li>i. The defendant intentionally abducts, kidnaps, or takes hostage another person;</li> <li>ii. with the intention to engage in a sexual act with the abductee.</li> </ol> <p>Increased penalty if committed against a minor. Set sentencing ranges from 5-10 years depending on whether the criminal act was complete or attempted on a child or an adult.</p>	<p>Crime of “abduction” is redefined as “a form of robbery in which a person uses excessive force and violates the right of liberty of a living person with the intention of having sexual intercourse with one or more persons.”</p> <p>No punishment is provided for the offence.</p>	<p>Referring to abduction as “robbery” trivialises the human nature of victims of sexual and gender-based violence.</p>

<sup>3</sup> “No set penalty” means that the draft SIB identifies the penalty as being “in accordance with Somali/Shari’ah law”.

	<p>Components of the crime of “unlawful detention for sexual purpose: slavery” are:</p> <ol style="list-style-type: none"> <li>i. He or she intentionally detains another person against their will;</li> <li>ii. with the intention to engage in a sexual act against the detainee.</li> </ol> <p>Sentence from 3-12 years' incarceration depending on whether the criminal act was complete or attempted on a child or an adult.</p>	<p>Crime of “kidnapping in the sexual business” reframes the criminal act as “any mentally healthy person who deliberately kidnaps or kidnaps and imprisons or sells him or her for the purpose of forcing the person to have sex and earn money from him/her.”</p> <p>Committing the crime against a child or a mentally disabled individual constitutes aggravating circumstances.</p> <p>No punishment is provided for the offence.</p>	<p>The additional caveat that the accused must be “mentally well” adds an additional barrier to proving their intention.</p> <p>The SOB requires intent to engage in sexual activity; whereas the SIB requires at minimal intent to <i>force</i> sexual activity.</p> <p>The language, changed from “detains” to “kidnaps,” introduces a higher threshold for conduct required for liability.</p>
<p>Admissibility of Evidence</p>	<p>The SOB provides a wide range of potential sources of evidence in sexual crimes, for example from teachers, police officers, obstetrician /gynaecologists, medical professionals, psychologists, forensic evidence, corroborative evidence.</p> <p>Bars a woman’s sexual history from being used as evidence in a sexual offence case.</p>	<p>SIB provides the following list of potential sources of evidence (it is unclear if this list is exhaustive or not):</p> <ul style="list-style-type: none"> <li>• Reports from an accredited physician who specialises in victim health assessment and outlines detailed injury data for the victim;</li> <li>• Evidence at the scene;</li> <li>• Evidence gathered by police using professional investigative tools.</li> </ul>	<p>The list of sources of evidence is significantly reduced.</p> <p>The difficulty of producing testimony from “an accredited physician who specialises in victim health assessment” will significantly hinder sexual assault investigations.</p> <p>The introduction of a woman’s sexual history as evidence puts both the woman and trial at risk of harmful myths connecting promiscuity and sexual assault.</p>
<p>Vitiating of Consent</p>	<p>The SOB provides that consent is vitiated when the person is:</p> <ol style="list-style-type: none"> <li>a) below the age of consent;</li> <li>b) incapable of understanding the essential nature of the sexual act or of communicating their unwillingness to participate in the act due to a disability;</li> <li>c) voluntarily or involuntarily intoxicated;</li> <li>d) unconscious;</li> <li>e) submits to the sexual act because of the use of torture, violence, coercion, or force on themselves or someone else;</li> <li>f) submits to the sexual act because he or she is in a coercive environment or under coercive circumstances; this includes being in an area where there: <ul style="list-style-type: none"> <li>• is a military presence,</li> </ul> </li> </ol>	<p>Under the SIB consent is only vitiated when:</p> <ul style="list-style-type: none"> <li>• The victim is found to not be able to control his or her physical and tactical sexual activity;</li> <li>• There is a real threat of intimidation; or</li> <li>• The victim is not mentally present.</li> </ul>	<p>The SIB significantly reduces situations where consent is vitiated. This makes it easier for defendants to argue the defence of consent, even in the coercive situations found in the SOB set out in column 2.</p> <p>By qualifying the grounds to “a real threat of intimidation” the burden shifts to the victim to establish there was a real threat of intimidation, for consent to be vitiated.</p> <p>This is a significant barrier to achieving conviction in cases of sexual and gender-based violence, especially in times of conflict.</p>

	<ul style="list-style-type: none"> <li>• are armed combatants or militia present or in control,</li> <li>• is a terrorist group present or in control,</li> <li>• there is ongoing armed conflict, or</li> <li>• there is ongoing widespread or systematic attack on a civilian population;</li> </ul> <p>g) submits to the sexual act because of threats or intimidation against themselves or someone else;</p> <p>h) submits to the sexual act because of fear of harm to themselves or to someone else;</p> <p>i) submits to the sexual act because he or she is outnumbered by a group of persons;</p> <p>j) submits to the sexual act whilst he or she is lawfully or unlawfully in detention;</p> <p>k) having consented to engage in the sexual act, expresses, by words or conduct, a lack of agreement to continue to engage in the sexual act.</p> <p><u>The Accused:</u></p> <p>l) causes the person to engage in the sexual act by abusing a position of trust, power or authority; and</p> <p>m) obtains the person's consent by fraud or false representation about the nature of the sexual act or the identity of the accused.</p>		
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**Annex II: Provisions Removed**

In addition to the substantive discrepancies above, a wide variety of provisions under the SOB have seemingly been removed under the SIB, notably:

Provision	Concerns
Sexual exploitation	The removal of this provision is likely to endanger those from vulnerable populations such as displaced communities and those from marginalised socioeconomic backgrounds.
Recording sexual offences	The offence is limited solely to publishing such material, removing criminal liability for a significant and traumatising aspect of the original offence.
Sexual offences against children: child rape, child gang rape, child marriage, child sexual exploitation, child sexual slavery, child sex tourism, child sex trafficking, child sexual	These detailed provisions with protections for children have either been completely removed or absorbed into general provisions that do not take into account the special vulnerabilities of children.

harassment, production of, sale or distribution of child pornography, grooming of children.	The deletion of child specific protections can only be attributed to the intention of the SIB to legalise sexual relations with children and child marriage.
Abuse of trust	The provisions relating to sexual offences committed by those in positions of trust, power or authority, principally designed to protect those vulnerable sexual abuse and exploitation, even though they are over the age of consent for sexual activity, have been removed.

**Annex III: Procedural Safeguards**

Many of the procedural safeguards found in sections 33-47 of the SOB have been diluted or removed. These procedural rules include:

Provision
o The duties of people in positions of authority, including police and prosecutors;
o The complaint handling procedure;
o Protection orders for victims;
o Jurisdictional clarification;
o Rights of victims and witnesses, including psychosocial care, emergency contraception, medical report and privacy;
o Additional safeguards for children and disabled individuals;
o Right to civil action against accused (though the SIB does say that victims are entitled to “compensation,” which requires that the prosecutor seek it for them).

**Annex IV: Sentencing Guidelines**

The following acts are criminalised in the proposed SIB, but have no sentencing guidelines:

Provision
o Attempted rape, rape and gang rape;
o Sexual Harassment and assault;
o Slavery and sexual slavery;
o Violence towards a vulnerable person;
o Sexual tourism and export;
o Forced marriage;
o Drug use;
o Abduction;
o Kidnapping;
o Pornography business;
o Dating;
o Homosexuality;
o Child marriage;
o Abusing vulnerable people;