Recommendations of the 172nd Law Commission Report

Proposed Amendments to the Indian Penal Code 1860 (IPC)

- Substitution of the existing Section 375 of the IPC recommended: The existing Section 375 defining rape be substituted by the definition of sexual assault. It has been attempted to include the common forms of child sexual abuse in this definition. The exception regarding marital rape has been retained.

Sexual Assault: Sexual assault means –

(a) Penetrating the vagina (which term shall include the labia majora), the anus, or unethra of any person with:
   (i) any part of the body of another person or
   (ii) an object manipulated by another person

(b) Manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus, or the urethra of the offender by any part of the other person’s body;

(c) Introducing any part of the penis of a person into the mouth of another person;

(d) engaging in cunnilingus or fellatio; or

(e) continuing sexual assault as defined in clauses (a) to (d) above

in circumstances falling under any of the six following descriptions:

First – Against the other person’s will;
Secondly – Without the other person’s consent;
Thirdly – With the other person’s consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt;
Fourthly – Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married;
Fifthly – With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent; and
Sixthly – With or without the other person’s consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section.

Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.
Section 376 has been redefined to provide for punishment for sexual assault.2

Section 376. Punishment for sexual assault—(1) Whoever, except in the cases provided for by subsection (2) commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the person subjected to sexual assault is his own wife and is not under sixteen years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

If the sexual assault is committed by a person in a position of trust or authority towards the person assaulted or by a near relative of the person assaulted, he/she shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than minimum punishment prescribed in this subsection.

(2) Whoever:
   (a) being a police officer commits sexual assault:
      (i) within the limits of the police station to which he is appointed; or
      (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
      (iii) on a person in his custody or in the custody of a police officer subordinate to him; or
   (b) being a public servant, takes advantage of his official position and commits sexual assault on a person in his custody as such public servant or in the custody of a public servant subordinate to him; or
   (c) being on the management or on the 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 takes advantage of his official position and commits sexual assault on any inmate of such jail, remand home, place, or institution; or
   (d) being on the management or on the staff of a hospital, takes advantage of his official position and commits sexual assault on a person in that hospital; or
   (e) commits sexual assault on a woman knowing her to be pregnant; or
   (f) commits sexual assault on a person when such person is under sixteen years of age; or
   (g) commits gang sexual assault;
shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine;

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1—Where a person is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang sexual assault within the meaning of this subsection.

Explanation 2—’Women’s or children’s institution’ means an institution, whether called an orphanage or a home for neglected children or a widows’ home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3—’Hospital’ means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.
Punishment for sexual assault has been enhanced: The minimum punishment has been recommended as five years by amending Sections 376B, 376C, and 376D.\(^3\)

Insertion of a new section dealing with unlawful sexual contact: A new Section 376E has been recommended to be added to the IPC, which deals with unlawful sexual contact. This section is intended to cover those forms of child sexual abuse wherein the abuser touches the victim with sexual intent either directly or indirectly with any part of the body or with an object. It also includes inciting or inviting or counseling and using undue influence with sexual intent to touch directly or indirectly with the part of the body or object.\(^4\) Many common forms of sexual abuse occur in this manner. Complaints under this proposed offence have to be instituted by the aggrieved person or by his/her father,

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\(^3\) The modified Sections 376A, 376B, and 376D of the IPC shall read as follows: ‘376B. Sexual intercourse by public servant with person in his custody—Whoever, being a public servant, takes advantage of his/her official position and induces or seduces any person, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him/her, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine. Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than five years.

4 376E, IPC : Unlawful sexual contact; (1) Whoever, with sexual intent, touches, directly or indirectly, with a part of the body or with an object, any part of the body of another person, not being the spouse of such person, without the consent of such other person, shall be punished with simple imprisonment for a term which may extend to two years or with fine or with both.

(2) Whoever, with sexual intent, 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, or touches, with sexual intent, directly or indirectly, with a part of the body or with an object any part of the body of a young person, shall be punished with imprisonment of either description which may extend to three years and shall also be liable to fine.

(3) Whoever, being in a position of trust or authority towards a young person, or is a person with whom the young person is in a relationship of dependency, touches, directly or indirectly, with sexual intent, with a part of the body or with an object, any part of the body of such young person, shall be punished with imprisonment of either description which may extend to seven years and shall also be liable to fine.

Explanation: ‘Young person’ in this subsection and Subsection (2) means a person below the age of sixteen years.’
mother, and brother or by his/her father's or mother's brother or sister or by any other person related to him/her by blood or adoption.\(^5\)

- **Deletion of Section 377 of the IPC**: The controversial Section 377 IPC relating to unnatural offences, which was generally used in cases of boy child sexual abuse cases as there was no other adequate provision, to be deleted.\(^6\)

- **Section 509 of the IPC to be amended**: The punishment for insulting the modesty of any woman by word, gesture, or act is to be enhanced from one year to three years.\(^7\)

- **Insertion of new Section 166A IPC**: If any public servant knowingly disobeys any direction of the law requiring his attendance at any place or regarding the conduct of any investigation will be punished.\(^8\)

### Proposed Amendments to the Criminal Procedure Code 1973 (CrPC)

- **Sections 160(3) and 164(4) and proviso of Section 160(1) to be amended**: In cases of sexual assault and unlawful sexual contact, the statement of the victim is to be recorded by a female police officer and

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\(^5\) Insertion of Section 198B to the CrPC: No court shall take cognizance of an offence punishable under Subsections (2) and (3) of Section 376E of the Indian Penal Code (45 of 1860) except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by his/her father, mother, brother, sister, or by his/her father’s or mother’s brother or sister or, by any other person related to him/her by blood or adoption, if so permitted by the court.

\(^6\) Section 377, IPC deserves to be deleted in the light of the changes effected by us in Sections 375 to 376E. We leave persons having carnal intercourse with any animal to their just deserts.

\(^7\) Section 509, IPC – 'Word, gesture, or act intended to insult the modesty of a woman: Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years and shall also be liable to fine.'

\(^8\) 166A. Whoever, being a public servant:

(a) knowingly disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter, or

(b) knowingly disobeys any other direction of the law regulating the manner in which he shall conduct such investigation, to the prejudice of any person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both'.
in case a female police officer is not available, by a female government servant or in the alternative by a female authorized by an organization interested in the welfare of women and children. If none of them are available, the officer in charge of the police station will have to record the statement after giving the reasons in writing.\textsuperscript{9} The recording of the statement of any woman or a male less than sixteen years (instead of fifteen years at present) has to be done at the place of residence in the presence of a relative, friend, or a social worker.

- Insertion of Section 164A to the CrPC: The medical examination of the victim of sexual assault should be by a registered medical practitioner with the consent of the victim. If the victim is a female, the medical examination has to be done by a female medical officer. The proposed amendment gives a format of the medical examination report.

\textsuperscript{9} Section 160(3) CrPC: Where the statement of a female is to be recorded either as first information of an offence or in the course of an investigation into an offence and she is a person against whom an offence under Sections 354, 375, 376, 376A, 376B, 376C, 376D, 376E, or 509 of the Indian Penal Code is alleged to have been committed or attempted, the statement shall be recorded by a female police officer and in case a female police officer is not available, by a female government servant available in the vicinity and in case a female government servant is also not available, by a female authorized by an organization interested in the welfare of women or children.

Subsection 160(4): Where in any case none of the alternatives mentioned in Subsection (3) can be followed for the reason that no female police officer or female government servant or a female authorized by an organization interested in the welfare of women and children is available, the officer in charge of the police station shall, after recording the reasons in writing, proceed with the recording of the statement of such female victim in the presence of a relative of the victim.

The proviso to Subsection (1) of Section 160 CrPC be substituted to read as follows: ‘Provided that no male person under the age of sixteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides. While recording the statement, a relative or a friend or a social worker of the choice of the person whose statement is being recorded shall be allowed to remain present. The relative, friend, or social worker so allowed to be present shall not interfere with the recording of statement in any manner whatsoever.’
The details to be provided include name, address, age, injury marks, victim's mental condition and a reasoned conclusion.\textsuperscript{10}

Insertion of Section 53A in the Cr PC: This proposed amendment relates to the medical examination of the accused of sexual assault by a registered medical practitioner. The report should include the name, address, age, marks of injury, who brought him, the duration of the medical examination, and any other details and a reasoned conclusion.\textsuperscript{11}

\textsuperscript{10} Section 376-A, 376-B, 376-C, 376-E CrPC (1) Where, during the stage when any offence under Section 376, Section 376A, Section 376B, Section 376C, Section 376D, or Section 376E is under investigation and it is proposed to get the victim examined by a medical expert, such examination shall be conducted by a registered medical practitioner, with the consent of the victim or of some person competent to give such consent on his/her behalf. In all cases, the victim should be sent for such examination without any delay. Provided that if the victim happens to be a female, the medical examination shall be conducted by a female medical officer, as far as possible.

(2) The registered medical practitioner to whom the victim is forwarded shall without delay examine the person and prepare a report specifically recording the result of his examination and giving the following details:
(i) the name and address of the victim and the person by whom he/she was brought,
(ii) the age of the victim,
(iii) marks of injuries, if any, on the person of the victim,
(iv) general mental condition of the victim, and
(v) other material particulars, in reasonable detail.
(3) The report shall state precisely the reasons for each conclusion arrived at.
(4) The report shall specifically record that the consent of the victim or of some person competent to give such consent on his/her behalf to such examination had been obtained.
(5) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall, without delay, forward the 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.
(6) Nothing in this section shall be construed as rendering lawful any examination without the consent of the victim or any person competent to give such consent on his/her behalf.

\textsuperscript{11} Section 53A Cr PC: (1) When a person accused of any of the offences under Sections 376, 376A, 376B, 376C, 376D, or 376E, or of an attempt to commit any of the said offences, is arrested and an examination of his/her person is to be made under this section, he/she shall be sent without delay to the registered medical practitioner by whom he/she is to be examined.

(2) The registered medical practitioner conducting such examination shall without delay examine such person and prepare a report specifically recording the result of his examination and giving the following particulars:
(i) the name and address of the accused and the person by whom he was brought, the duration of the medical examination,
(ii) the age of the accused,
(iii) marks of injury, if any, on the person of the accused, and
(iv) other material particulars, in reasonable detail.
(3) The report shall state precisely the reasons for each conclusion arrived at.
(4) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall, without delay, forward the 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.
• A proviso to be added to Section 273 Cr PC: While taking evidence of a sexual assault victim who is below sixteen years of age, appropriate measures have to be taken so as to avoid confrontation by the accused.12

Proposed Amendments to the Indian Evidence Act 1872 (IEA)

Section 114A and 146 of the IEA to be amended: In a prosecution for sexual assault and unlawful sexual contact or an attempt to commit such offences, if the victim states in her evidence that she did not consent, the court shall so presume. This will be a rebuttable presumption of law.13 It has also been proposed that in such cases, the evidence of the character or the past sexual history of the victim will not be relevant.14

Recommendations not Accepted by the Law Commission

There are certain recommendations which were made in the petition by Sakshi but were not accepted by the 172nd Law Commission Report and which

12 'Provided that where the evidence of a person below sixteen years, who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.'

13 Section 114A IEA : Presumption as to absence of consent in certain prosecutions for sexual assault: In a prosecution for sexual assault under Clause (a) or Clause (b) or Clause (c) or Clause (d) or Clause (e) or Clause (g) of Subsection (2) of Section 376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the other person alleged to have been sexually assaulted and such other person states in his/her evidence before the court that he/she did not consent, the court shall presume that he/she did not consent. Explanation: 'Sexual intercourse' in this section and Sections 376C and 376D shall mean any of the acts mentioned in Clauses (a) to (e) of Section 375. Explanation to Section 375 shall also be applicable.

14 Section 53A IEA 1973 : In a prosecution for an offence under Sections 376, 376A, 376B, 376C, 376D, or 376E, or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of his/her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent. In Section 146 of the Indian Evidence Act, the following clause shall be added after Clause (3):

'(4) In a prosecution for an offence under Sections 376, 376A, 376B, 376C, 376D, or 376E, or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to his/her general immoral character, or as to his/her previous sexual experience with any person for proving such consent or the quality of consent'.
need to be incorporated in the laws relating to CSA to make the law more effective and child friendly. They are as follows:

- Exception to Section 375 not deleted [sexual intercourse by a man with his own wife (above sixteen years) is not sexual assault]. Marital rape has still not been recognized in the Indian legal system.

- Second proviso to Section 376(1) and the proviso to Section 376(2) (which confer a discretion upon the court to award a sentence lesser than the minimum punishment) are not deleted. The discretion still remains.

- Definition of ‘consent’ has not been considered. It is important to define as to what consent is in rape cases. In Mathura’s case, the court regarded absence of marks of injury as consent. Such interpretations need to be prevented in future.

- No mandatory provision has been laid down for investigation of offences of rape and other sexual offences by women police officers only.

- While granting bail to a person accused of sexual assault, one of the conditions which should be imposed by the court shall be that such person shall not be in the proximity of the person. No provision has been made relating to this aspect.

- No provisions have been made for non-inference with or disturbance of the natural habitat of the person sexually assaulted by or through the criminal justice process and for the investigation of trial of sexual offences to be time bound and to be concluded within six months.

- The expression ‘social worker’ is not defined.

- There is no presumption in respect of the age of victim. The age of the victim will have to be proved. As mentioned earlier, the age of proof is a very cumbersome process, at present, as many children do not have documentary evidence and the medical evidence has to be relied on.
• There is no provision for safe environment in which the child can recover. (Recording of evidence of minor by video tape/circuit television or appropriate breaks not provided for).
• There is no provision for trial by special courts (this suggestion was considered impractical by the Law Commission).
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