

NATIONAL COUNCIL FOR
LAW REPORTING
LIBRARY

SPECIAL ISSUE

Kenya Gazette Supplement No 149 (National Assembly Bills No 24)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2020

NAIROBI, 14th August, 2020

CONTENT

Bill for Introduction into the National Assembly—

PAGE

The Sexual Offences (Amendment) Bill 2020

731

THE SEXUAL OFFENCES (AMENDMENT) BILL, 2020

A Bill for

AN ACT of Parliament to amend the Sexual Offences Act, 2006 to provide for the manner of collection, analysis, tracking and access to forensic evidence relating to sexual assault and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

1 This Act may be cited as the Sexual Offences (Amendment) Act, 2020

Short title

2 Section 2 of the Sexual Offences Act, in this Act referred to as “the principal Act”, is amended by—

Amendment of s 2 of
No 3 of 2006

- (a) deleting the definition of “Minister” and substituting therefor the following new definition in proper alphabetical sequence—

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to legal affairs and public prosecutions,

- (b) inserting the following new definitions in proper alphabetical sequence—

“health care professional” includes any person who has obtained professional health qualifications and is licensed by the relevant regulatory body,

“Inspector General” means the holder of the office of the Inspector-General appointed in accordance with Article 245

(2)(a) of the Constitution,

“release form” means a document provided to a victim of sexual assault, which gives the victim the option of authorizing, in writing, the release of a sexual examination kit to a law enforcement agency for forensic analysis,

“restricted sexual assault examination kit” means a kit that does not have an accompanying signed release form authorizing a law enforcement agency to submit the kit for forensic analysis,

“sexual assault examination kit” means an evidence bundle, including biological material, gathered from a victim of sexual assault by a health care professional,

“system” means the Sexual Assault Forensic Evidence Tracking System” developed pursuant to section 34C,

“unrestricted sexual assault examination kit” means a kit that has an accompanying release form signed by a victim of sexual assault allowing a law enforcement agency to submit the kit for forensic analysis,

3 Section 26(7) of the principal Act is amended in paragraph (b) by deleting the word “Minister” appearing immediately after the word “any” and substituting therefor the words “Cabinet Secretary”

Amendment of s
26 of No 3 of
2006

4 The principal Act is amended by inserting the following section immediately after section 30—

Insertion of new
section 30A in No
3 of 2006

Background
checks

30A (1) An employer shall confirm that a person seeking employment to a position of care or access to children or any vulnerable person has not been charged or convicted of an offence under this Act

(2) An employer who knowingly employs a convicted sexual offender in a position of care or access to children or any vulnerable person commits an offence and is liable upon conviction to imprisonment for a term not exceeding three years or to a fine not exceeding one million shillings or to both

5 The principal Act is amended by inserting the following new sections immediately after section 34—

Insertion of new
s 34A 34B 34C and
34D in No 3 of 2006

Sexual assault
examination kit

34A When examining a victim of sexual assault, a healthcare professional shall collect evidence of the assault using a sexual assault examination kit comprising—

- (a) instructions for use,
- (b) evidence collection bags and sheets,
- (c) swabs,
- (d) sterile urine collection containers,
- (e) sterile sample containers,
- (f) blood collection devices,

(g) combs for the collection of hair and fibre,

(h) clear glass slides,

(i) self-sealing envelopes for preserving any samples collected,

(j) nail picks,

(k) sheets for collection of physical evidence stripped from a victim's body,

(l) documentation forms,

(m) labels,

(n) mouth rinses,

(o) sterile water, and

(p) saline solutions

(2) A person who manufactures, imports or sells a sexual assault examination kit shall ensure that the kit contains a trackable component which accords to the requirements of the tracking system established under section 34C

Processing of kit

34B (1) A healthcare professional who prepares a sexual examination kit shall notify the appropriate law enforcement agency of the preparation of the kit if the victim of sexual assault—

(a) requests that a law enforcement agency be so notified, and

(b) signs a release form

(2) Where the victim of sexual assault consents to the preparation of an unrestricted sexual examination kit, a law enforcement agency shall collect the kit from the health care professional within ten days of written notice that the kit is ready for collection

(3) A law enforcement agency shall submit an unrestricted sexual assault examination kit for forensic analysis within sixty days of collecting it, unless the relevant investigating officer advises in writing that there exists sufficient evidence to prosecute the complaint of sexual assault

(4) A healthcare professional who prepares a restricted sexual assault examination kit shall cause the kit to be securely stored at the healthcare facility where the kit is prepared for at least twenty-four months

(5) A victim of sexual assault may give consent for the transmission of a restricted sexual examination kit to a law enforcement agency during the twenty-four month retention period under subsection (4)

(6) The State shall bear all costs incurred for the examination of a victim of sexual assault for the purpose of gathering evidence,

including expenses related to—

- (a) preparing a sexual assault examination kit, and
- (b) conducting tests for sexually transmitted diseases and pregnancy on the victim

(7) Where the victim of sexual assault is a child, a healthcare professional may advise the child to consult his or her parent or guardian and the decision of the child shall constitute consent

Sexual Assault
Forensic Evidence
Tracking System

34C (1) Within six months of the commencement of this Act, the Inspector General shall develop and implement an electronic sexual assault forensic evidence tracking system

(2) The system shall allow—

- (a) tracking of the location and status of each sexual assault examination kit including—
 - (i) its initial collection by the relevant law enforcement agency,
 - (ii) its receipt and storage by the law enforcement agency,

(iii) its receipt and analysis at an accredited forensic crime laboratory, and

(iv) its destruction or disposal after completion of analysis

(b) a healthcare facility at which a kit is prepared, law enforcement agency, accredited crime laboratory, prosecutor, or other entity providing a chain of custody for the kit to update and track its status and location, and

(c) allow a victim of sexual assault to anonymously track and receive updates regarding the status and location of his or her kit

(3) Every facility or entity that collects evidence of a sexual assault or investigates or prosecutes a sexual assault for which evidence has been collected shall participate in the System

(4) The Inspector General shall ensure the confidentiality of the System

(5) Records relating to evidence tracked under the System may be accessed only by—

(a) a victim from whom the evidence was collected or the victim's parent or guardian, where a minor, or

(b) an employee of a facility or entity described under subsection 3, for purposes of updating or tracking the status or location of an item of evidence

(6) A person who, without authorization—

(a) wilfully accesses or causes to the system to be accessed

(b) knowingly shares the status of a sexual assault examination kit, or

(c) knowingly alters or destroys information contained in the system,

commits an offence and is liable, upon conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding fifteen years, or to both

Promotion of public awareness

34D (1) The national and county governments shall promote public awareness on the collection of sexual assault forensic evidence and the tracking system through a nationwide education and information campaign

6 Section 35 of the principal Act is amended—

Amendment of s 35 of No 3 of 2006

- (a) in subsection (3) by deleting the word “Minister” appearing immediately after the expression “subsection (2), the” and substituting therefor the words “Cabinet Secretary”,
- (b) in subsection (5) by deleting the word “Minister” appearing immediately after the words “gazetted by the” and substituting therefor the words “Cabinet Secretary”

7 Section 36 of the principal Act is amended—

Amendment of s 36 of No 3 of 2006

- (a) in subsection (4) by deleting the word “Minister” appearing immediately after the words “determined by the” and substituting therefor the words “Cabinet Secretary”,
- (b) in subsection (7)(b) by deleting the word “Minister” appearing immediately after the word “any” and substituting therefor the words “Cabinet Secretary”

8 Section 46 of the principal Act is amended by deleting the word “Minister” appearing immediately after

Amendment of s 46 of No 3 of 2006

the word “The” and substituting therefor the words “Cabinet Secretary”

9 The principal Act is amended by deleting section 47 and substituting therefor the following new section—

Repeal and
replacement of s
47 of No 3 of
2006

Regulations

47 (1) The Cabinet Secretary shall, within six months of the commencement of this Act and in consultation with the Cabinet Secretaries for the time being responsible for matters relating to internal security, prisons, social services, education and health, make regulations prescribing—

- (a) the inter-sectoral implementation of this Act,
- (b) the standard contents of a sexual assault examination kit,
- (c) the standard procedure for preparation of a sexual assault examination kit,
- (d) the qualifications of a healthcare professional who may prepare a sexual examination kit,
- (e) the designated or accredited forensic laboratories which may process a sexual examination kit
- (f) the specifications of the trackable component to be embedded in a

- sexual assault examination kit,
- (g) the design of the Sexual Assault Forensic Evidence Tracking System,
- (h) measures to ensure the confidentiality of the Sexual Assault Forensic Evidence Tracking System,
- (i) healthcare facilities approved to participate in the Sexual Assault Forensic Evidence Tracking System,
- (j) forms provided for under this Act, and
- (k) any other matter which is necessary or expedient to prescribe in order to achieve or promote the objects of this Act

(3) For the purposes of Article 94 (6) of the Constitution—

- (a) the purpose and objective of delegation under this section is to enable the Cabinet Secretary to make regulations to provide for the better carrying into effect of the provisions of this Act,

- (b) the authority of the Cabinet Secretary to make regulations under this Act will be limited to bringing into effect the provisions of this Act and to fulfil the objectives specified under this section,
- (c) the principles and standards applicable to the regulations made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act, 2013

Cap 2
No 23 of 2013

MEMORANDUM OF OBJECTS AND REASONS

Statement of objects and reasons for the Bill

The principal object of this Bill is to amend the Sexual Offences Act, 2006 to provide for the manner of collection, analysis, tracking and access to forensic evidence relating to sexual assault. The amendments provide for contents and the preparation of sexual examination kits to allow for the collection of evidence of sexual assault from victims for possible submission for forensic analysis. Under the proposals in the Bill, a victim of sexual assault is entitled to the free preparation of a sexual examination kit which they may consent to be submitted for forensic analysis.

Additionally, the Bill requires the establishment of a system for tracking of any kits prepared by the healthcare professional who and the healthcare facility at which the kit was prepared, the law enforcement agency which collects the kit for analysis, the entity which analyses the kit for possible forensic evidence and the victim of sexual assault. Under the proposed tracking system to be developed and implemented by the Inspector General of Police, measures have to be put in place to allow a victim of sexual assault to participate anonymously.

Enactment of the Bill shall ensure uniformity and accountability in the collection of crucial evidence that may be used in the successful prosecution of sexual offenders. Further, the rights of victims of sexual assault to anonymity and access to information relating to submitted evidence shall be guaranteed.

Clause 2 of the Bill amends the interpretation section of the Act to align it with the terms used in the Constitution and introduces new definitions into the Act.

Clause 4 of the Bill inserts a new section 30A into the Act to require all employers to confirm whether a person seeking employment to a position of care or access to children or any vulnerable person has previously been charged or convicted of a sexual offence. An employer who fails in this obligation is liable upon conviction to imprisonment for a term not exceeding three years or to a fine not exceeding one million shillings or to both.

Clause 5 of the Bill inserts new sections 34A, 34B, 34C and 34D into the Act. The new section 34A defines the standard contents of a sexual assault examination kit and requires all kits to contain a trackable component. The new section 34B outlines the manner of preparation and processing of a sexual assault examination kit. Under the section, a sexual examination kit may only be forwarded to a law enforcement agency for purposes of forensic analysis with the consent of a victim. Upon submission of a kit

which a victim has consented to be analyzed, a law enforcement agency is under an obligation to conduct the analysis within sixty days unless the analysis becomes unnecessary where there exists sufficient evidence to prosecute a complaint of sexual assault. In that event, the relevant investigating officer must give written advise to that effect. The section further requires the state to shoulder all costs related to the preparation of a sexual examination kit and related tests. The new section 34C requires the development and implementation of an electronic Sexual Assault Forensic Evidence Tracking System to enable access to the real-time status and location of a sexual assault examination kit. All healthcare facilities, designated forensic laboratories at which analysis of the kit is done and law enforcement agencies are to participate in the system which must allow anonymous access to a victim of sexual assault whose kit has been prepared and submitted for analysis. The new section 34D obliges the national and county governments to sensitize the public on the objects of the Bill with regard to the collection and tracking of sexual assault forensic evidence.

Clause 9 of the Bill repeals and replaces the current section 47 of the Bill on the powers of making regulations under the Act. The new section 47 empowers the Cabinet Secretary responsible for matters relating to the to make regulations within six months of the commencement of the Act in order to operationalize it.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

This Bill delegates legislative powers to the Cabinet Secretary responsible for the Act to make regulations for the purposes of its implementation. The Bill does not limit any fundamental rights or freedoms.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall occasion additional expenditure of public funds.

Dated the 13th August, 2020

GATHONI WAMUCHOMBA,
Member of Parliament

Section 2 of Act No 3 of 2006 which it is proposed to amend—

Interpretation

2 (1) In this Act, unless the context otherwise requires—

“act which causes penetration” means an act contemplated under this Act,

“child” has the meaning assigned thereto in the Children Act (No 8 of 2001),

“complainant” means the Republic or the alleged victim of a sexual offence and in the case of a child or a person with mental disabilities, includes a person who lodges a complaint on behalf of the alleged victim where the victim is unable or inhibited from lodging and following up a complaint of sexual abuse,

“consent” has the meaning assigned to it under this Act,

“DNA” means deoxyribonucleic acid, the genetic code unique to every living organism, including human beings and “DNA Test” shall be construed accordingly,

“gang” means two or more persons,

“genital organs” includes the whole or part of male or female genital organs and for purposes of this Act includes the anus,

“gang rape” deleted by Act No 7 of 2007, Sch ,

“HIV” means the Human Immunodeficiency Virus which causes AIDS,

“HIV test” means the test which determines whether a person is infected with HIV,

“indecent act” means an unlawful intentional act which causes—

- (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration,
- (b) exposure or display of any pornographic material to any person against his or her will,

“intermediary” means 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,

“law enforcement officer” means any person whose duties involve law enforcement and includes but is not limited to a police officer as defined under the Police Act,

“person with mental disabilities” means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act,
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation,
- (c) unable to resist the commission of any such act, or
- (d) unable to communicate his or her unwillingness to participate in any such act,

“Minister” means the Minister for the time being responsible for matters relating to legal affairs and public prosecutions,

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person,

“sexual offence” means any offence prescribed in this Act, and

“vulnerable person” means a child, a person with mental disabilities or an elderly person and “vulnerable witness” shall be construed accordingly

Section 26 of Act No 3 of 2006 which it is proposed to amend—

Deliberate transmission of HIV or any other life threatening sexually transmitted disease

26 (1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know—

- (a) will infect another person with HIV or any other life threatening sexually transmitted disease,
- (b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease,

(c) will infect another person with any other sexually transmitted disease,

shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life

(2) Notwithstanding the provisions of any other law, where a person is charged with committing an offence under this section, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct, for the purpose of ascertaining whether or not he or she is infected with HIV or any other life threatening sexually transmitted disease

(3) The sample or samples taken from an accused person in terms of subsection (2) shall be stored at an appropriate place until finalization of the trial

(4) The court shall, where the accused person is convicted, order that the sample or samples be tested for HIV or any other life threatening sexually transmitted disease and where the accused person is acquitted, order that the sample or samples be destroyed

(5) Where a court has given directions under subsection (4), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned

(6) An appropriate sample or samples taken in terms of subsection (5)—

(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of determining whether or not the accused person is infected with HIV or any other life threatening sexually transmitted disease, and

(b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—

(a) the State,

(b) any Minister, or

(c) any medical practitioner or designated persons,

in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the cause of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both

(9) Where a person is convicted of any offence under this Act and it is proved that at the time of the commission of the offence, the convicted person was infected with HIV or any other life threatening sexually transmitted disease whether or not he or she was aware of his or her infection, notwithstanding any other sentence in this Act, he or she shall be liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life

(10) For purposes of this section—

(a) the presence in a person's body of HIV antibodies or antigens, detected through an appropriate test or series of tests, shall be prima facie proof that the person concerned is infected with HIV, and

(b) if it is proved that a person was infected with HIV after committing an offence referred to in this Act, it shall be presumed, unless the contrary is shown, that he or she was infected with HIV when the offence was committed

Section 35 Act No 3 of 2006 which it is proposed to amend—

Medical treatment orders

35 (1) A court shall upon conviction of a person having committed a sexual offence and if satisfied that the convicted person is dependent on or has the propensity to misuse alcohol, any drug or is suffering from any other disorder, and may benefit from treatment, grant an order for treatment or professional counseling and such an order shall be made in addition to any sentence, including a sentence of imprisonment which is not suspended

(2) Notwithstanding the provisions of subsection (1), a court shall, at any time at the request of a victim of sexual offence or an intermediary, grant an order for the treatment of a victim of sexual offence

(3) Notwithstanding the provisions of subsection (2), the Minister responsible for Health shall prescribe circumstances under which a victim of a sexual offence may at any time access treatment in any public hospital or institution

(4) The expenses incurred for the treatment or professional counseling of any person convicted of an offence under this section or a victim of a sexual offence as the case may be, shall be borne by the State

(5) All treatment in respect of a treatment order or professional counselling granted under this Act shall be undertaken at a public hospital or institution or any other institution approved or gazetted by the Minister responsible for health

(6) All medical records relating to treatment pursuant to subsections (1), (2), (3) and (4) shall be kept and may be used as evidence before any court with regard to any offence under this Act

Section 36 Act No 3 of 2006 which it is proposed to amend—

Evidence of medical, forensic and scientific nature

36 (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial

(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed

(4) The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister

(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing

by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned

(6) An appropriate sample or samples taken in terms of subsection (5)—

- (a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not, and
- (b) in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—

- (a) the State,
- (b) any Minister, or
- (c) any medical practitioner or designated persons,

in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both

Section 46 of Act No 3 of 2006 which it is proposed to amend—

National policy framework

46 The Minister shall—

- (a) prepare a national policy framework to guide the implementation, and administration of this Act in order to secure acceptable and uniform treatment of all sexual related offences including treatment and care of victims of sexual offences,
- (b) review the policy framework at least once every five years, and
- (c) when required, amend the policy framework

Section 47 of Act No 3 of 2006 which it is proposed to amend—

Regulations

47 The Minister may, in consultation with the Ministers for the time being responsible for matters relating to Internal Security, Prisons, Social Services, Education and Health, make regulations regarding—

- (a) any matter which is required or permitted by this Act to be prescribed by regulations,
- (b) the inter-sectoral implementation of this Act, and
- (c) any other matter which is necessary or expedient to prescribe in order to achieve or promote the objects of this Act