LAW REFORM COMMISSION

Opinion Paper

Offences against Persons
(Re Draft Criminal Code (Amendment) Bill)

[April 2012]

Port Louis, Republic of Mauritius

4th Floor, Cerné House

Tel: (230) 212-3816/212-4102

Fax: (230) 212-2132

E-Mail: lrc@mail.gov.mu

URL http://lrc.gov.mu
Law Reform Commission

Chairperson: Mr. Guy OLLIVRY, QC, GOSK

Chief Executive Officer: Mr. Pierre Rosario DOMINGUE [Barrister]

Members:
- Mr. Satyajit BOOLELL, SC [Director of Public Prosecutions]
- Mrs. Aruna D. NARAIN [Parliamentary Counsel]
- Mr. Nicholas F. OHSAN BELLEPEAU [Ag. Deputy Master & Registrar]
- Mr. Rishi PURSEM, SC [Barrister]
- Mr. Narendra APPA JALA, SA [Attorney]
- Mr. Michel Nicolas BOULLÉ [Notary]
- Mrs. Luvishka SEEJORE BILTOO [Law Academic (UoM)]
- Mrs. Daisy Rani BRIGEMOHANE [Civil Society]
- Mr. Navin GUNNASAYA [Civil Society]

Secretary: Mrs. Saroj BUNDHUN
Legal Research Cadre (other than Chief Executive Officer)

Consultant : Professor Robert Louis GARRON
Law Reform Officer : Mr. Sabir M. KADEL
Legal Research Assistant : Mr. Goran GEORGIJEVIC

Administrative Support Staff (other than Secretary to Commission)

Senior Officer : Mrs. Marie Roselilette SOOBRAMANIA
Officer : Mrs. Neelamani BANSRAM
            Mrs. Kajal RAMDUT
Senior Office Attendant : Mr. Subhas CHUMMUN
Office Attendant-Driver : Mr. Claude François JEAN-PIERRE
            Mr. Naraindranathsingh JANKEE
About the Commission

THE LAW REFORM COMMISSION OF MAURITIUS consists of –
(a) a Chairperson, appointed by the Attorney-General;
(b) a representative of the Judiciary appointed by the Chief Justice;
(c) the Solicitor-General or his representative;
(d) the Director of Public Prosecutions or his representative;
(e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
(f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
(g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
(h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
(i) two members of the civil society, appointed by the Attorney-General.

Under the direction of the Chairperson, the Chief Executive Officer is responsible for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible for taking the minutes of all the proceedings of the Commission and is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

The Commission may appoint staff on such terms and conditions as it may determine and it may resort to the services of persons with suitable qualifications and experience as consultants to the Commission.
Executive Summary

Opinion Paper “Offences against Persons [Re Draft Criminal Code (Amendment) Bill]”
[April 2012]

The Commission has considered the Draft Criminal Code (Amendment) Bill, which seeks to amend the Criminal Code to authorize the termination of pregnancy in specified circumstances. The Bill extends the circumstances when it may be necessary to have recourse to abortion, and the termination of pregnancy would not be regarded as an offence but rather as a health issue: cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. In these circumstances medical abortion would be authorized.

The Commission is of the view that the proposed amendment to the Criminal Code would make our law compliant with our international human rights obligations.
1. The Commission has considered the Draft Criminal Code (Amendment) Bill, which seeks to amend the Criminal Code to authorize the termination of pregnancy in specified circumstances.

2. In accordance with principles, stated time and again by the Commission since it came into operation in 2006, namely that our law should be compliant with our international human rights obligations, the Commission is of the opinion:

   (1) The Bill extends the circumstances when it may be necessary to have recourse to abortion, and the termination of pregnancy would not be regarded as an offence but rather as a health issue.

   Currently, under our law, it is not an offence for a gynaecologist/obstetrician to terminate pregnancy when there is “une implantation extra-utérine de l’ovocyte fécondé” (such as une “implantation ovarienned ou tubaire”) as both the pregnant woman and the embryo/foetus would die if the gynaecologist/obstetrician does not intervene. Necessity to save the life of the pregnant woman in such a case is an exonerating circumstance recognised by our criminal law, which is based on the same principles as the French Criminal Code [the French Court of Cassation has held that “l’état de nécessité” is a “fait justificatif”: vide Jurisclasseur Droit Pénal, ‘Faits justificatifs - État de nécessité, at note 16], and is in accordance with the “Serment d’Hippocrate” which all medical practitioners adhere to.

   The proposed change merely redefines the circumstances which in law would amount to a state of necessity justifying termination of pregnancy: cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. In these circumstances medical abortion would be authorized.
(2) The proposed amendment to the Criminal Code would make our law compliant with our international human rights obligations.

In its Concluding observations, following examination of the combined sixth to seventh periodic reports of Mauritius [CEDAW/C/MUS/CO/6-7] on 21 October 2011, at para. 32, the UN Committee on the Elimination of All Forms of Discrimination against Women expressed concern at the maintenance of the provision in the Criminal Code criminalizing abortion and the punitive measures faced by women and girls if they pursue an abortion, the prevalence of clandestine abortions and the ensuing high rate of health complications among women and girls.

In its Concluding observations, following examination of the fourth periodic report of Mauritius [CCPR/CO/83/MUS], on 27 April 2005, the UN Human Rights Committee [at para. 9] noted with concern that section 235 of the Criminal Code penalizes abortion even when the mother's life is in danger, and thus may encourage women to resort to unreliable and illegal abortion, with inherent risks for their life and health (Covenant, art. 6). It recommended that Mauritius should review its legislation to ensure that women are not forced to carry pregnancies to term in violation of the rights guaranteed by the Covenant.

(3) The amendment to the law is in accordance with Article 14(2)(c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, signed by the Republic of Mauritius on 29 January 2005, which requires of a State Party that it takes all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.