



RESEARCH NOTE

# Compensation for the mental suffering of rape victims and rape and prostitution laws relating to minors

## A Comparative Study

A research note by Vinson & Elkins for Beijing Zhongze Women's Legal Counseling and Service Centre

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## Disclaimer

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# INTRODUCTION

According to Beijing Zhongze Women's Legal Counseling and Service Centre, the rape of girls under the age of 14 in China is occurring with increasing frequency.

The Centre is part of the Centre for Women's Law Studies and Legal Services of Beijing University, which was established in 1995 as the first NGO specializing in women's legal aid, research and advocacy in China. The Centre supports rape victims by helping them understand their legal rights and guiding them through the criminal justice system. In the course of their work, the Centre identified two legal issues that are negatively impacting rape victims in China, namely: obstacles to accessing compensation for mental suffering resulting from rape, and the disparity between punishments for rape and the prostitution of under-age girls.

In China, the maximum sentence for rape of a woman of any age is the death penalty. However, the maximum sentence for prostitution of an under-age girl is only 15 years imprisonment plus a fine. The prostitution offence recognizes that under-age girls engaging in prostitution have the ability to consent to sex, which conflicts with the general rule that the legal age of consent is 14. The law also provides the perpetrator with a defence that he did not know the girl was under-age, meaning he could ultimately go free. As such, many perpetrators of rape claim they are guilty of prostitution with an under-age girl instead, so as to avoid the more severe sentence of capital punishment.

This loophole has caused controversy in China, and people have started advocating for the crime of prostitution of under-age girls to be abolished. To provide better protection for under-age girls, advocates argue that anyone engaged in sexual relations with under-age girls should be convicted of rape and punished accordingly.

Further, under the laws of China, rape victims are not able to make a claim for mental suffering resulting from the rape during the criminal procedure, and can only bring a separate tort claim in a civil court. Applicable laws do not provide guidance on how to prove the mental suffering of a victim or a description of what constitutes mental illness. This is a significant obstacle to rape victims claiming fair compensation, especially as many experience mental damage that is far greater than any physical damage, with some victims experiencing mental suffering for the rest of their lives.

This comparative research note on *Compensation for the mental suffering of rape victims and rape and prostitution laws relating to minors* was requested by the Centre to help them understand the legislative approaches to these issues in different countries. The Centre used the research to prepare a proposal that they submitted to the National People's Congress annual conference in 2013, with the hope of strengthening protections for women and girls, and improving access to compensation for rape victims.

# EXECUTIVE SUMMARY

This comparative study (this “**Study**”) has been prepared exclusively for Beijing Zhongze Women’s Legal Counseling and Service Centre (the “**Centre**”) by Vinson & Elkins LLP, with contributions from McCarthy Tétrault LLP, Vancouver BC (in respect of Section III A) and Drew & Napier LLC, Singapore (in respect of Section III F) and in connection with the Centre’s proposal to the National People’s Congress annual conference regarding compensation for the mental suffering of rape victims and rape laws relating to minors.

This Study is a product of general research carried out with respect to certain laws of Alberta (Canada), England and Wales, Florida (US), Germany, Hong Kong, Illinois (US), New York (US), Ontario (Canada), the People’s Republic of China (PRC), Singapore, Taiwan, and Texas (US) as of the date of this Study (collectively, the “**Jurisdictions**”).

As instructed by the Centre, this Study focuses on:

- (a) compensatory regimes relating to the mental suffering of rape victims in each of the Jurisdictions, including:
  - (i) how legislation defines mental suffering and evidentiary requirements for mental suffering;
  - (ii) situations in which a rape victim who has suffered mentally from his or her ordeal is entitled to compensation; and
  - (iii) the manner in which such compensation is calculated.
- (b) rape and prostitution laws in each of the Jurisdictions relating to minors, including:
  - (i) the age of consent and the punishment for engaging in sexual acts with a person under the age of consent (including whether claiming not to have known that the victim was under-age can be relied on as a defence);
  - (ii) whether the punishment for the rape of an under-age victim is more severe than punishment for the rape of a victim who has attained the age of consent; and
  - (iii) whether prostitution is a crime and, if so, the difference in punishment between rape and prostitution.

This Study is subject to the assumptions, limitations and qualifications set out in the Disclaimer.

## 1 Mental suffering as defined by legislation and associated evidentiary requirements

The term “mental suffering” is not explicitly defined by legislation in any of the Jurisdictions other than England and Wales where the relevant legislation recognises mental injury as including conditions attributed to post-traumatic stress disorder and depression and lists psychological symptoms of such mental injury (including anxiety, tension, insomnia, irritability, loss of confidence and agoraphobia) as well as related physical symptoms (including alopecia, asthma, eczema, enuresis and psoriasis). Such mental injury would need to be diagnosed by a registered medical practitioner, psychiatrist or clinical psychologist.

Other Jurisdictions do recognize that injuries can be psychological in nature and usually a medical opinion would be sought to confirm the mental injury (for example in Alberta, Ontario, Germany, Hong Kong and the PRC). Notably, in Germany, there is an implied assumption that every victim of a sexual offence will suffer mentally. In the United States, a successful civil claim for intentional infliction of emotional distress (“**IIED**”) will usually require that severe emotional distress has occurred, proven by the preponderance of the evidence. “Severe” means substantial or enduring as distinguished from trivial or transitory<sup>1</sup>.

## 2 Compensation regime for rape victims suffering from mental injury

The majority of the Jurisdictions have established state-funded schemes or funds to which a victim of rape (and other criminal offences) may apply for compensation or at least have recognised statutes pursuant to which claims can be made and compensation awarded independent of any compensation awarded by the courts through civil or criminal actions.

Factors surrounding each individual rape case will be considered by compensation boards which administer the relevant scheme or fund<sup>2</sup>, including the number of attackers, the time taken to report the incident, the amount of treatment necessary and the on-going impact on the victim. In cases where a victim has received monetary damages via court proceedings, a compensation board will consider this when awarding compensation under a scheme or fund (generally there will be no double recovery).

Certain Jurisdictions have clear guidelines regarding the amount of compensation to be awarded depending on the injury suffered. England and Wales’ compensation scheme appears to be the most sophisticated in this respect with a tariff clearly setting

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1 Fletcher v. Western Nat’l Life Ins. Co. 10 CA.3d 376 (1970).

2 In those Jurisdictions in which compensation schemes or funds have been established.

out levels of compensation depending upon the injury suffered. The minimum amount of compensation payable under the current tariff is £1,000 (approximately US\$1,609), which would be payable to a victim of minor indecent assault, with the maximum amount of compensation payable to a victim of serious sexual abuse resulting in serious internal bodily injuries with a permanent disabling severe mental illness is £44,000 (approximately US\$70,788). Alberta, Hong Kong, Ontario and Taiwan have established ranges or guidelines of compensation to be awarded and the states of Florida, Illinois and Texas cap compensation to be awarded under the relevant schemes. Germany's state-supported statutory compensation regime for victims of crime (including rape) also grants, in principle, a state pension for victims of an intentional, unlawful violent assault whom suffer consequential health damage. California, Singapore and the PRC do not have fixed guidelines or tariffs as to the amount of compensation to be awarded. Certain states in the United States expressly exclude non-economic losses from the types of losses which are recoverable.

### 3 The age of consent and the punishment for engaging in under-age sexual activity

The age of consent is 16 years old in Canada, England and Wales, Hong Kong<sup>3</sup>, Singapore, Taiwan and Florida. In Illinois, New York and Texas the age of consent is 17 years old and in California, 18 years old. In Germany and the PRC the age of consent is 14 years old (however in Germany valid consent must be thoroughly established). Notably, in the PRC males of any age cannot be victims of rape under PRC law.

In Canada a minor may consent to sexual activity if his or her sexual partner is close in age to him or her (within specified limits), there is no relationship of trust between the participants and no exploitation is involved.

In certain Jurisdictions sexual activity with a minor under a certain age will be deemed to be statutory rape and an offender will be punished for the offence of rape regardless of the consent of the minor (for example in Germany and Singapore, sexual activity with a minor under the age of 14 is deemed statutory rape; in England and Wales and Hong Kong the threshold age of the minor is under 13 years old).

The defence of mistaken age may apply in certain of the Jurisdictions if the defendant took all reasonable steps to ascertain the age of the minor prior to engaging in the sexual act and if the minor is above a certain age. For example, in England and Wales the defence may apply if the defendant is under 18 years old and reasonably believed that the minor was over 16 years old at the time of the incident; however, if the minor was under 13 years old there would be no defence of mistaken belief.

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3 This is reduced to 13 if the man reasonably believes the girl is his wife. The age of consent for homosexual buggery with a boy or buggery with a girl is 21.

## **4 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?**

Sexual offences against minors will generally carry higher penalties than those against adults however, in certain Jurisdictions, the maximum punishment available is the same for the rape of an adult or a minor (for example, capital punishment is the maximum sentence for the rape of a victim of any age in the PRC and in England and Wales life imprisonment is the maximum sentence for the rape of a victim of any age).

The age of the victim and the age of the offender will usually be considered by the courts when sentencing the offender; generally the greater the age gap, the greater the level of punishment. As an example, in Florida, if the minor is under the age of 12 and the offender is an adult, the maximum sentence is capital punishment however if the offender is under the age of 18, the maximum punishment is life imprisonment.

We note that of the Jurisdictions researched, capital punishment only applies in the PRC and Florida.

## **5 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?**

Of the Jurisdictions researched, prostitution itself (being a prostitute) is not a crime except in the United States where being a prostitute is generally punishable by imprisonment of up to one year and potentially an additional fine. Activities related to prostitution (such as procuring others to become involved in prostitution, soliciting prostitution, keeping a brothel and advertising prostitution) are illegal in most of the Jurisdictions. Punishment is generally less severe for engaging in activities related to prostitution than for rape, however this is not consistent across all Jurisdictions. In the PRC for example, the maximum punishment for rape and for certain offences related to prostitution is the same: the death penalty.

If the prostitute is a minor then an offender engaging in sexual activities with such prostitute will likely be more severely punished than if the prostitute were an adult (and if statutory rape laws apply, an offender will be punished for rape rather than prostitution). In England and Wales, cases involving prostitutes under 18 years old are punishable as follows: the maximum punishment for paying for sex with a minor under 13 years old is life imprisonment (and would be deemed statutory rape), however that sentence would be 14 years' imprisonment if the minor was instead 13, 14 or 15 years old or seven years' imprisonment if the prostitute was 16 or 17 years old. Consent is irrelevant. In Texas, soliciting a minor (aged 14 to 17 years old) to engage in prostitution is punishable by a prison sentence of two to 20 years and a fine of up to US\$10,000, however had the prostitute been an adult, the punishment would have been a lesser sentence of up to 180 days' imprisonment and a fine of up to US\$2,000.

# THE STUDY

## A CANADA

This section has been reviewed and finalized by the Vancouver BC office of McCarthy Tétrault LLP.

Canada operates under a federal system with two distinct jurisdictions of statutory authority, namely the country-wide federal legislature and the ten provincial legislatures. The enactment of the Criminal Code of Canada<sup>4</sup> (the “**Criminal Code**”) is within the exclusive jurisdiction of the federal government, and is applied uniformly throughout the entire country. However certain related statutes (including legislation establishing compensation regimes for victims of crime) have been passed at a provincial level. To illustrate such provincial laws in this Study we have focussed on two provinces, namely Alberta and Ontario.

### 1 Mental suffering<sup>5</sup> as defined by legislation and associated evidentiary requirements

#### 1.1 Alberta

Alberta legislation does not define “mental suffering”; however, Alberta’s Victims of Crime Act<sup>6</sup> (the “**Alberta Compensation Act**”) uses the broader term “injury” to describe the consequences suffered by victims of crimes.<sup>7</sup> The mental suffering of rape victims has qualified<sup>8</sup> as an injury under the category of “psychological injuries” as defined by the related Victims of Crime Regulation<sup>9</sup> (the “**Alberta Compensation Regulations**”).

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4 R.S.C., 1985, c. C-46.

5 In Canadian law the term “mental suffering” is most often used in relation to claims for aggravated damages in civil law suits. An award for aggravated damages may compensate a plaintiff for mental suffering endured as the result of the actions the defendant; *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085

6 RSA 2000, c V-3 [Alberta Compensation Act]. This act replaced the Criminal Injuries Compensation Act, RSA 1980, c C-33.

7 *Ibid* at ss. 1(l)(i) and 12(1).

8 See *P.A.L. v. Alberta (Criminal Injuries Review Board)*, 2012 ABCA 177.

9 Alta Reg 63/2004 [Alberta Compensation Regulations].

Claims for compensation may require the applicant to provide information in respect of how the injuries were acquired and to describe the injuries suffered by the victim.<sup>10</sup> The applicant may also be required to provide any statement, document, information or matter that, in the opinion of the Director appointed by Alberta's Minister of Justice and Solicitor General<sup>11</sup>, may assist in dealing with the application, whether or not such statement, document, information or matter would be admissible as evidence in a court of law.<sup>12</sup>

## 1.2 Ontario

The term "mental suffering" is not used within Ontario's Compensation for Victims of Crime Act<sup>13</sup> (the "**Ontario Compensation Act**"). However, the term "injury" is defined as actual bodily harm, including pregnancy and mental or nervous shock.<sup>14</sup> The Ontario Compensation Act also states that compensation may be provided to a victim due to "pain and suffering"<sup>15</sup> associated with a violent crime,<sup>16</sup> although that term is not defined. Applicants are required to provide details regarding the crime including a victim description, police or court records, proof of the offender's conviction, testimonials from relatives or friends, medical or treatment reports, compensation from other sources, expenses, evidence of loss of income, and other information that the applicant believes should be considered.<sup>17</sup>

## 2 Compensation regime for rape victims suffering from mental injury

### 2.1 Alberta

The Alberta Compensation Act established the Victims of Crime Fund<sup>18</sup> and introduced the Victims of Crime Financial Benefits Program. Any provincial fines and surcharges which result from criminal proceedings in Alberta are used to fund this program. The Victims of Crime Fund is administered by the Public Security Division within the Alberta Ministry of Justice and Solicitor General.

An individual who has suffered physical or emotional harm as a result of a crime that occurred in Alberta may be eligible for benefits under the Financial Benefits Program.<sup>19</sup>

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10 Alberta Compensation Act, *supra* note 3, at s. 13(2)(a).

11 Alberta Compensation Act, *supra* note 3, at s. 3.

12 Alberta Compensation Act, *supra* note 3 at s. 13(2)(b).

13 Compensation for Victims of Crime Act, R.S.O. 1990, c. C.24 [Ontario Compensation Act].

14 Ontario Compensation Act, *supra* note 9 at s. 1.

15 Ontario Compensation Act, *supra* note 9 at s. 7(1)(d).

16 Ontario Compensation Act, *supra* note 9 at s. 5(a).

17 Criminal Injuries Compensation Board, "Guide: Applying for Compensation for an Injury", online: Criminal Injuries Compensation Board, <<http://www.cicb.gov.on.ca>>.

18 Alberta Compensation Act, *supra* note 3 at s. 9.

19 Alberta Compensation Act, *supra* note 3 at s. 12.

The crime must have been reported to the police within a reasonable time<sup>20</sup> and the victim must provide his/her cooperation to the police investigation.<sup>21</sup> Applications for financial benefits must generally be made within two years of the occurrence of the crime, however, this does not apply where the victim was a minor or in circumstances where there are compelling reasons to grant an extension.<sup>22</sup>

The Financial Benefits Program provides victims of violent crime with a one-time financial benefit, based on the number and severity of their injuries. The amount that is awarded is set in the Alberta Compensation Regulations, and can be up to CA\$110,000<sup>23</sup> (approximately US\$111,860). If a person dies as the result of a crime, the maximum amount of benefits that the victim's family can receive is CA\$12,500<sup>24</sup> (approximately US\$12,710).

The Alberta Compensation Regulations prescribe the level of compensation for psychological injury relating to a sexual assault based on the severity of the physical and psychological injury. Factors which will be taken into consideration include whether the victim was under-age at the time of the assault, whether multiple assaults or multiple aggressors/weapons were involved, whether sexual penetration was involved and the amount of treatment required to deal with the psychological injury. Depending on the number of factors present compensation will range from CA\$4,000 (approximately US\$4,070) to CA\$30,000 (approximately US\$30,510).<sup>25</sup>

A victim may also apply to the court for restitution. Such an application may be argued before the court at the discretion of the Crown Prosecutor. Restitution refers to payment by the offender to the victim for losses they have suffered or cost incurred as a result of the offence. In relation to rape, such losses may include bodily or psychological harm or other expenses incurred (including moving out of the offender's house, if relevant). A judge will decide whether to award restitution as a part of the offender's sanctions depending on the facts of the individual case.

## 2.2 Ontario

The Ontario Compensation Act establishes an administrative tribunal, the Criminal Injuries Compensation Board (the "**Compensation Board**"),<sup>26</sup> in order to oversee the compensation due to victims, or the family of a deceased victim, following a violent criminal act.<sup>27</sup> Criminal acts that can give rise to compensation under the Ontario Compensation Act include any crime of violence that constitutes an offence under the

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20 Alberta Compensation Act, supra note 3 at s. 12.2(1).

21 Alberta Compensation Act, supra note 3 at s. 13(3).

22 Alberta Compensation Act, supra note 3 at ss. 12.2, 12.3 and 12.4.

23 Alberta Compensation Regulations, supra note 6 at s. 8(4).

24 Alberta Compensation Regulations, supra note 6 at s. 8.1(4).

25 Alberta Compensation Regulations, supra note 6 at Schedule 3.

26 Ontario Compensation Act, supra note 9 at s. 3(1).

27 Ontario Compensation Act, supra note 9 at s. 5.

Criminal Code,<sup>28</sup> including sexual assault and the sexual abuse of a child.<sup>29</sup> If mental suffering is determined to have taken place the victim may be entitled to compensation.<sup>30</sup>

The Compensation Board is required to “have regard to all relevant circumstances, including any behaviour of the victim that may have directly or indirectly contributed to his or her injury or death”, when considering whether to award compensation and determining the amount of such compensation.<sup>31</sup> The Compensation Board has indicated that awards for “pain and suffering” are based on several factors, including:

- (a) the nature of the crime/abuse;
- (b) any breach of trust or abuse of power;
- (c) the age and vulnerability of the victim;
- (d) the degree of violence involved;
- (e) the seriousness of the injuries sustained or the extent of the harm caused;
- (f) the recovery period;
- (g) the possibility of a continuing disability; and
- (h) the impact the crime/abuse had on the victim’s life.<sup>32</sup>

The Compensation Board has indicated that in assessing a claim it also considers the following additional factors:

- (a) whether a violent crime under the Criminal Code has occurred, or an arrest, or whether the victim was assisting a peace officer with his/her law enforcement duties, or trying to prevent a crime from occurring;
- (b) whether the victim has refused reasonable cooperation with or failed to report the offence promptly to the police; and
- (c) whether the victim has received any benefits paid by other sources as a result of the crime.<sup>33</sup>

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28 Ontario Compensation Act, *supra* note 9 at s. 5(a).

29 The Compensation Board views children who have been victims of sexual abuse as potentially eligible for compensation for pain and suffering, with no indication of a requirement of violence as an element of such abuse: Criminal Injuries Compensation Board, “Fact Sheet: Mental or Nervous Shock Claims”, online: Criminal Injuries Compensation Board, <<http://www.cicb.gov.on.ca>>.

30 Ontario Compensation Act, *supra* note 9 at s. 1 “injury”.

31 Ontario Compensation Act, *supra* note 9 at s. 17(1).

32 [www.cicb.gov.on.ca/en/award1.htm](http://www.cicb.gov.on.ca/en/award1.htm).

33 Criminal Injuries Compensation Board, “Guide: Applying for Compensation for an Injury”, *supra* note 13. It should be noted, however, that the Ontario Compensation Act provides that an order for compensation may be made regardless of whether the offender is prosecuted or convicted: see s. 16(1).

The application for compensation must be submitted within two years after the date of injury, though the Compensation Board has discretion to grant extensions.<sup>34</sup> In order to assist victims while an application is being processed or considered, the Ontario Compensation Act provides for interim assistance where the Compensation Board considers an award of compensation probable.<sup>35</sup>

The Compensation Board will provide a maximum award of CA\$25,000 (approximately US\$25,415) in the case of a lump sum payment, or CA\$1,000 (approximately US\$1,017) per month, for all injuries (including both physical and mental injury) resulting from a violent crime.<sup>36</sup> If more than one person is injured as a result of the same crime, the maximum award paid to victims collectively is CA\$150,000 (approximately US\$152,490) in the case of a lump sum payment, or a total of CA\$365,000 (approximately US\$371,059) in the case of periodic payments.<sup>37</sup>

### 3 The age of consent and the punishment for engaging in under-age sexual activity

Since the Criminal Code is applicable throughout Canada, the same legislation applies to crimes involving under-age sex in Alberta and Ontario. Under the Criminal Code, “sexual interference” and “invitation to sexual touching” in connection with persons under the age of 16 are offences.<sup>38</sup> “Sexual exploitation” of a person aged 16 or 17 by an individual in a position of trust or authority is also an offence.<sup>39</sup> Therefore, the age of consent in Canada is either 16 or 18, depending on the specific offence. Section 150.1(1) of the Criminal Code provides that consent is not a defence against any of those offences, subject to the following exceptions applicable to sexual interference and invitation to sexual touching:

- (a) minors who are 14 or 15 years old can consent to sexual activity with a partner as long as such other person is less than five years older and there is no relationship of trust, authority or dependency, and the relationship is not exploitative;<sup>40</sup> and

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34 Ontario Compensation Act, *supra* note 9 at s. 6.

35 Ontario Compensation Act, *supra* note 9 at s. 14(1).

36 Ontario Compensation Act, *supra* note 9 at s. 19(1). If both a lump sum and monthly payments are made, the lump sum can be no greater than CA\$12,500 (approximately US\$12,708).

37 Ontario Compensation Act, *supra* note 9 at s. 19(2).

38 Criminal Code, *supra* note 1, defines “sexual interference” as directly or indirectly touching, for a sexual purpose, with a part of the body or with an object, any part of the body of a person under the age of 16 years (s. 151), and “invitation to sexual touching” as inviting, counseling, or inciting, for a sexual purpose, a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person (s. 152).

39 Criminal Code, *supra* note 1, essentially defines “sexual exploitation” as sexual interference or invitation to sexual touching, as those offences are defined in ss. 151 and 152, of a person 16 or 17 years old who is in a position of dependency or where the relationship is exploitative: s. 153(1).

40 Criminal Code, *supra* note 1 at s. 150.1(2.1).

- (b) minors who are 12 or 13 years old can consent to sexual activity with a partner as long as such other person is less than two years older and there is no relationship of trust, authority or dependency, and the relationship is not exploitative.<sup>41</sup>

Unless the accused took all reasonable steps to ascertain the age of the complainant, there is no defence of mistaken belief in the age of the complainant.<sup>42</sup>

The punishment for the offences of sexual interference, invitation to sexual touching and sexual exploitation is the same:<sup>43</sup>

- (a) if the offence is prosecuted as an indictable offence, a person found guilty is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; and
- (b) if the offence is prosecuted as a summary offence, a person found guilty is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

#### 4. Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?

The Criminal Code does not use the term “rape” but instead refers to assault, defined as the intentional application of force, including threats to apply force,<sup>44</sup> and provides for the specific offence of “sexual assault”<sup>45</sup> being any assault committed in circumstances of a sexual nature.<sup>46</sup> As a consequence, sexual assault includes threats to apply force in circumstances of a sexual nature. In addition to the offences of sexual interference, invitation to sexual touching, and sexual exploitation, the Criminal Code provides for a number of other offences of a sexual nature, such as child pornography,<sup>47</sup> voyeurism,<sup>48</sup> luring a child,<sup>49</sup> etc. Therefore, depending on the circumstances, an individual charged with sexual assault could also simultaneously be charged with other offences of a sexual nature.

The sentencing of a person convicted of sexual assault depends on a number of factors, including any relevant aggravating or mitigating circumstances and the age of the victim.<sup>50</sup> The prosecutor decides whether to proceed summarily or by indictment based

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41 Criminal Code, *supra* note 1 at s. 150.1(2).

42 Criminal Code, *supra* note 1 at s. 150.1(6).

43 Criminal Code, *supra* note 1 at ss. 151, 152, 153(1.1).

44 Criminal Code, *supra* note 1 at s. 265(1)(a)(b).

45 Criminal Code, *supra* note 1 at s. 271.

46 Alan D Gold, *The Practitioner’s Criminal Code*, 2013, (Markham, Ontario: LexisNexis Inc., 2012), at 459.

47 Criminal Code, *supra* note 1 at s. 163.1.

48 Criminal Code, *supra* note 1 at s. 162.

49 Criminal Code, *supra* note 1 at s. 172.1.

50 Criminal Code, *supra* note 1 at s. 718.2.

on the seriousness of the allegations, the accused's previous criminal history, and the complexity of the case. An offender convicted of sexual assault by indictment is liable to imprisonment for a term not exceeding 10 years and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of one year.<sup>51</sup> If convicted by summary conviction, the offender is liable to imprisonment for a term not exceeding 18 months and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of 90 days.<sup>52</sup>

If the sexual assault is aggravated (resulting in the wounding, maiming, disfiguring or endangerment of the life of the victim) or involves a weapon the penalties are more severe (up to life imprisonment).<sup>53</sup>

Consent, in connection with sexual assault, aggravated sexual assault, and sexual assault with a weapon, is defined as "the voluntary agreement of the complainant to engage in the sexual activity in question."<sup>54</sup> No other individual may consent on the complainant's behalf; the complainant must be capable of consenting to the sexual activity; the offender must not have abused a position of trust, power or authority; the complainant must not have expressed by words or conduct a lack of consent; and the complainant may withdraw consent at any time.<sup>55</sup> It is not a defence for the offender to have believed that the complainant consented to the activity due to the accused's self-induced intoxication or reckless or wilful blindness.<sup>56</sup> There is no defence available to the offender if he or she did not take reasonable steps to ascertain that the complainant was consenting.<sup>57</sup>

## 5. Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?

Prostitution (engaging in sex for money) is not a crime if the prostitute is over 18 years old; however, sections 210 to 213 of the Criminal Code outline offences related to prostitution, including keeping a brothel,<sup>58</sup> transporting a person to a brothel, and procuring prostitution. Essentially, although consensual sex between two adults for consideration is not in itself punishable at law, other events surrounding the act of prostitution are prohibited. The punishments for the different offences vary. For example, section 210(1) states that anyone who keeps a brothel is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years. Anyone

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51 Criminal Code, supra note 1 at s. 271(a).

52 Criminal Code, supra note 1 at s. 271(b).

53 Criminal Code, supra note 1 at ss. 272(2), 273(2).

54 Criminal Code, supra note 1 at s. 273.1(1).

55 Criminal Code, supra note 1 at s. 273.1(2).

56 Criminal Code, supra note 1 at s. 273.2(a).

57 Criminal Code, supra note 1 at s. 273.2(b).

58 A brothel is defined as a place kept, occupied, or resorted to for the purpose of prostitution or the practice of acts of indecency: Criminal Code, supra note 1, at s. 197.

guilty of the offence of procuring prostitution, as described in section 212(1), is liable to imprisonment for a term not exceeding ten years.

Section 212(4) of the Criminal Code states that it is an offence to obtain, or to communicate for the purpose of obtaining, the sexual services of any person under 18 years of age for consideration (money or any exchange of items of value). Thus, solicitation of a prostitute who is a minor is always illegal. It is no defence to say that the accused believed the complainant was 18 years old or older.<sup>59</sup> Anyone found guilty under section 212(4) of the Criminal Code is liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of six months.

It should be noted that the Supreme Court of Canada has recently agreed to hear the appeal of *Bedford v. Canada (Attorney General)*,<sup>60</sup> in which the offences of keeping a brothel, living on an income resulting from prostitution, and communicating for the purpose of prostitution are being challenged on the grounds that these provisions of the Criminal Code violate sexual workers' constitutional rights of liberty, safety and freedom of expression. The case is expected to be heard in the fall of 2013.

In addition to the provisions of federal law concerning prostitution in connection with minors, Alberta has adopted the Protection of Sexually Exploited Children Act ("**PSECA**"),<sup>61</sup> which attempts to regulate street prostitution through child protection legislation. While the aim of PSECA is not to "punish" minors (defined as those under 18 years of age)<sup>62</sup> engaged in prostitution, in practice it authorizes the involuntary detention of minors engaged in prostitution. PSECA allows for a minor who is considered at immediate risk of being involved in prostitution to be taken away by the police or caseworker to a safe house and confined for up to five days, which can be renewed to a maximum of an additional 42 days.<sup>63</sup> Such minors are connected with support services and placement services if they are unable to return home. At the safe house, the minor will be assessed for protection needs, medical concerns, drug and alcohol use, and other risks.<sup>64</sup>

PSECA also makes it an offence for an individual to solicit a child involved in prostitution, encourage a child to become involved in prostitution, or prevent a child from accessing services designed to help them leave. Thus, it is an offence to willfully cause a minor to be in need of protection or to obstruct or interfere with a director or police officer exercising any power or performing any duty under PSECA. A person so convicted is liable to a fine of not more than CA\$25,000 (approximately US\$25,415) or to imprisonment for not more than 24 months, or to both a fine and imprisonment.<sup>65</sup>

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59 Criminal Code, *supra* note 1 at s. 150.1(5).

60 2010 ONCA 814.

61 RSA 2000, c P-30.3. [PSECA].

62 *Ibid* at s. 1.

63 *Ibid* at ss. 2, 3.

64 Government of Alberta, "Protection of Sexually Exploited Children and Youth", online: Alberta Human Services, <humanservices.alberta.ca>.

65 PSECA, *supra* note 54, at s. 9.

## B ENGLAND AND WALES

### 1 Mental suffering as defined by legislation and associated evidentiary requirements

#### 1.1 The Criminal Injuries Compensation Scheme

The Criminal Injuries Compensation Authority (“CICA”) is a government organization which, amongst other things, compensates victims of crime in England and Wales for their physical and/or mental suffering sustained as a result of such crime by virtue of the Criminal Injuries Compensation Scheme (the “Scheme”).

The Scheme<sup>66</sup> states that a “personal injury” includes, amongst other things, mental injury (a medically recognized psychiatric or psychological illness) and further states that mental injury may result from a physical injury, or from a sexual offence, or may occur without physical injury. Compensation will not ordinarily be payable for mental injury alone (i.e. without physical injury), however a victim of rape may be able to make such a claim if one of the prescribed exceptions apply, including if the applicant was put in reasonable fear of immediate physical harm to his or her own person or was the non-consenting victim of a sexual offence (which does not include a victim who consented in fact but was deemed in law not to have consented).

The Scheme describes “mental illness” or “mental anxiety” as including “conditions attributed to post-traumatic stress disorder, depression and similar generic terms within which there may be: (a) such psychological symptoms as anxiety, tension, insomnia, irritability, loss of confidence, agoraphobia and preoccupation with thoughts of guilt or self-harm; and (b) related physical symptoms such as alopecia, asthma, eczema, enuresis and psoriasis.”<sup>67</sup>

To prove that the victim has suffered from a mental illness or temporary mental anxiety, it is necessary for their mental injury to be “medically verified”. This means that it should be diagnosed by a registered medical practitioner or have been given a “psychiatric diagnosis/prognosis” (by a psychiatrist or clinical psychologist).

CICA considers a mental illness to be “disabling” if it significantly impairs a person’s functioning in some important aspect of his/her life. For example, work or school performance, social relationships or sexual dysfunction.

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66 The Scheme, Section 9.

67 Note 8 to the Tariff of Injuries scheduled to the Scheme.

## 1.2 Civil and Criminal Claims

In parallel to a claim under the Scheme, a person suffering from a mental illness as a result of being raped may:

- (a) pursue a claim in a civil court against the defendant for damages; and/or
- (b) be awarded damages for suffering by a criminal court.<sup>68</sup>

If an offender is sent to prison by a criminal court, the victim will not be able to seek damages from that offender through the criminal courts.<sup>69</sup> The main advantage of seeking a civil claim is that it is irrelevant whether the individual has been found guilty in the criminal courts; the civil court will still hear the case. A claimant will have to self-fund a claim in the civil courts although if the claim is successful the court may include an amount for the claimant's legal costs in its award. A civil claim for damages is only worthwhile if the prospective defendant is either insured or has the means to pay any damages awarded. If a victim is awarded damages by a court, CICA will deduct (or claw-back) any amount of court ordered compensation from the Tariff amount that it may award to the victim (as further described in paragraph 2.1 below).

Although it is rare that civil claims for damages for rape are brought in the English courts, there have been instances where the victim has been awarded compensation. In 2006,<sup>70</sup> a victim was awarded £259,000 (approximately US\$416,678) by a judge who accepted that the victim had been drugged and abused by her wealthy attacker, despite the fact that there were no witnesses to the offence. It is also established that regardless of whether it leads to a criminal prosecution, rape victims within marriages may be awarded damages in the civil courts.<sup>71</sup>

## 2 Compensation regime for rape victims suffering from mental injury

### 2.1 The Criminal Injuries Compensation Scheme

#### 2.1.1 Overview.

The Scheme<sup>72</sup> lists rape and attempted rape as qualifying offences. CICA can pay out compensation in accordance with the Scheme to people who have been physically or

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68 See the Scheme, Section 7(a), for prohibition against repeated claims in respect of the same criminal injury under the Scheme or any other scheme for compensation of victims of violent crime in operation in the UK.

69 [http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/VictimsOfCrime/DG\\_196166](http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/VictimsOfCrime/DG_196166).

70 <http://www.guardian.co.uk/uk/2006/nov/15/topstories3.ukcrime>.

71 *Amanda Lawson v Ann Glaves-Smith, Executor of the Estate of Christopher John Dawes Deceased* [2006] EWHC 2865 (QB).

72 Patricia Wynn Davies, "Wife Wins Damages for Rape, Case against Husband Sets Civil Precedent" in *The Independent*, 10 September 1997.

mentally injured because they were the innocent victim of these offences, even if nobody has been convicted of the crime in question or nobody has been charged.<sup>73</sup> Generally, claims must be based on crimes that have been reported to the police,<sup>74</sup> although a conviction is not necessary as claims are based on the civil law principle of “balance of probabilities”<sup>75</sup> rather than the “beyond reasonable doubt” method used in UK criminal courts. The Scheme includes a tariff table which sets out the standard amounts of compensation for each description of injury (the “**Tariff**”). The Tariff is set by Parliament. There are 25 levels in the Tariff (Level 1 being the minimum award to be made under the Scheme and Level 25 being the highest). Compensation is usually awarded as a lump sum payment, however occasionally compensation payments can be made where there is a pressing need or where the prognosis is uncertain. The Tariff includes a specific category of “non-consensual penile penetration of the vagina and/or anus and/or mouth” (including a category for children under the age of 18), which is consistent with the definition of rape in the Sexual Offences Act 2003. The Stern Review, published in 2010, noted that the total compensation that victims of rape receive will depend on whether they are eligible to receive compensation, over and above their eligibility to receive compensation under the Tariff, where the overall compensation may also include other payments, for example for loss of earnings.<sup>76</sup>

The minimum amount of compensation payable under the present Tariff is £1,000 (approximately US\$1,609), which will be payable to the victim of a minor indecent assault. The maximum amount of compensation payable to the victim of serious sexual abuse, including rape and buggery, which resulted in serious internal bodily injuries with a permanent disabling severe mental illness confirmed by psychiatric diagnosis is £44,000 (approximately US\$70,788). The total maximum amount payable by the Scheme in respect of the same injury will not exceed £500,000<sup>77</sup> (approximately US\$804,410).

CICA will examine the type and severity of a victim’s injuries, analyze the ongoing impact on his or her life and calculate expenses incurred by that victim including lost earnings, medical and care bills and costs associated with the administration of a victim’s affairs due to a lack of mental capacity (if applicable).<sup>78</sup> Factors such as time limits, reporting the assault, long term effects of the assault and individual circumstances of each case will contribute towards the compensation decision.

While the Scheme is designed to cover crimes of violence, an exception is made for non-forcible rape and other sexual crimes not involving violence. As noted previously, compensation payments may be made for mental as well as physical injury suffered by non-consenting victims of sexual offences. However, when a person is a victim of

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73 The Scheme, Section 10.

74 CICA Criminal Injuries Compensation Scheme 2008, a guide page 13.

75 CICA Criminal Injuries Compensation Scheme 2008, a guide page 28.

76 Vivien Stern CBE, “The Stern Review, a Report by Baroness Vivien Stern CBE of an Independent Review into how Rape Complaints are handles by Public Authorities in England and Wales”, page 108 (Government Equalities Office, March 2010).

77 The Scheme, Section 24.

78 The Scheme, Section 35.

a sexual offence and also suffers a mental injury, the applicant will be entitled only to the higher of the relevant two Tariff amounts.<sup>79</sup> CICA have clarified that generally a rape victim will be compensated for the mental or psychological injury rather than the sexual offence itself for two reasons: firstly, the award may be higher for mental or psychological injury and secondly, the compensation for rape injury is primarily for mental or psychological injury, not physical injury.

## 2.1.2 Appeals.

If a rape victim is not satisfied with CICA's decision regarding compensation awarded he or she may seek a review of the decision under the Scheme by a claims officer.<sup>80</sup> Further appeal against a decision taken on a review under the Scheme will be determined by the First-tier Tribunal.<sup>81</sup> This adjudication panel is independent of CICA.

## 2.1.3 Mitigating Factors with regard to amount of compensation payable.

CICA is not obliged to pay out compensation to victims of crime in all scenarios. If the victim has a criminal record, CICA may reduce or withhold compensation payable to that victim. CICA will also check that the victim's behavior did not contribute to the incident and will consider the degree to which the victim cooperated with the police and other agencies before, during and after the incident relating to the relevant claim.<sup>82</sup>

Publicity was given in 2008 to a number of cases in which rape victims had their compensation under the Scheme reduced by 25% because they had been drinking prior to the assault taking place. The Stern Review has since noted that CICA's current policy is that applicants "who suffer a sexual assault while under the influence of drugs or alcohol will be eligible for a full award, if all other eligibility criteria are satisfied."<sup>83</sup>

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79 Note 5 of the General Notes to Tariff of Injuries under the Scheme (2008).

80 The Scheme, Sections 53-60.

81 The Scheme, Section 61.

82 The Scheme, Sections 13-15.

83 [www.equalities.gov.uk/PDF/Stern\\_Review\\_acc\\_FINAL.pdf](http://www.equalities.gov.uk/PDF/Stern_Review_acc_FINAL.pdf).

## 2.2 Calculation of Compensation

### 2.2.1 The Tariff.

The following excerpt from the Tariff sets out the standard amounts of compensation available for victims of sexual abuse.<sup>84</sup>

DESCRIPTION OF INJURY	LEVEL	STANDARD AMOUNT
<b><u>SEXUAL ABUSE OF CHILDREN</u></b>		
Minor isolated incidents: non-penetrative indecent acts	1	£1,000 (≈US\$1,609)
Pattern of serious abuse: repetitive, frequent non-penetrative indecent acts	5	£2,000 (≈US\$3,218)
Pattern of severe abuse: repetitive, frequent indecent acts involving digital or other non-penile penetration and/or oral-genital contact	7	£3,000 (≈US\$4,827)
Pattern of severe abuse over a period exceeding three years	11	£6,000 (≈US\$9,654)
Repeated non-consensual vaginal and/or anal intercourse over a period up to three years	13	£10,000 (≈US\$16,090)
Repeated non-consensual vaginal and/or anal intercourse over a period exceeding three years	16	£17,500 (≈US\$28,157)
<b><u>SEXUAL OFFENCE (VICTIM ANY AGE)</u></b>		
<b><u>SEXUAL ASSAULT:</u></b>		
Minor non-penetrative indecent physical act(s) over clothing	1	£1,000 (≈US\$1,609)
Minor frequent non-penetrative indecent physical act(s) over clothing	3	£1,500 (≈US\$2,413)
Serious non-penetrative indecent act(s) under clothing	5	£2,000 (≈US\$3,218)
Severe non-penile penetration, and/or oral-genital contact	7	£3,300 (≈US\$5,309)
Pattern of repetitive frequent severe abuse (whether by one or more attackers) over a period of up to three years	11	£6,600 (≈US\$10,619)

84 A full copy of the Tariff complete with qualifying notes may be found at: <http://www.justice.gov.uk/downloads/victims-and-witnesses/cic-a/am-i-eligible/Criminal-Injuries-Compensation-Scheme-2008.pdf>.

DESCRIPTION OF INJURY	LEVEL	STANDARD AMOUNT
Pattern of repetitive frequent severe abuse (whether by one or more attackers) over a period exceeding three years	12	£8,200 (≈US\$13,193)
Resulting in serious internal bodily injuries	17	£22,000 (≈US\$35,398)
Resulting in permanently disabling mental illness (in the case of children if the mental illness is moderate, not severe, the payout will be a maximum of £22,000 (≈US\$35,398))	18	£27,000 (≈US\$43,442)
<b><u>NON-CONSENSUAL VAGINAL AND/OR ANAL AND/OR MOUTH INTERCOURSE (VICTIM ANY AGE):</u></b>		
By one attacker	13	£11,000 (≈US\$17,701)
By two or more attackers	14	£13,500 (≈US\$21,724)
Resulting in serious internal bodily injuries	17	£22,000 (≈US\$35,398)
Resulting in permanently disabling moderate mental illness	17	£22,000 (≈US\$35,398)
Resulting in permanently disabling severe mental illness	18	£27,000 (≈US\$43,442)
Resulting in serious internal bodily injuries with permanently disabling moderate mental illness	19	£33,000 (≈US\$53,105)
Resulting in serious internal bodily injuries with permanently disabling severe mental illness	20	£44,000 (≈US\$70,807)
Pattern of repetitive incidents (whether by one or more attackers) over a period of up to three years	15	£16,500 (≈US\$26,549)
Pattern of repetitive incidents (whether by one or more attackers) over a period exceeding three years	17	£22,000 (≈US\$35,398)
<b><u>MENTAL ILLNESS AND TEMPORARY MENTAL ANXIETY (RELATING TO ANY ASSAULT, SEXUAL OR OTHERWISE):</u></b>		
Disabling, but temporary mental anxiety lasting more than six weeks	1	£1,000 (≈US\$1,609)
Disabling mental disorder:		
– lasting up to 28 weeks	6	£2,500 (≈US\$4,022)
– lasting over 28 weeks to two years	9	£4,400 (≈US\$7,081)
– lasting two years to five years	12	£8,200 (≈US\$13,196)
– lasting over five years but not permanent	14	£13,500 (≈US\$21,726)
Permanently disabling mental disorder:		
– moderately disabling	16	£19,000 (≈US\$30,573)
– seriously disabling	18	£27,000 (≈US\$43,442)

### 3 The age of consent and the punishment for engaging in under-age sexual activity

The age of consent for any form of sexual activity in England and Wales is 16 for both men and women. The law is not, however, intended to prosecute mutually agreed sexual activity between two young people of a similar age, unless it involves abuse or exploitation. Children under the age of 13 are classed as not being legally able to give their consent to any form of sexual activity. Rape occurs if one person does not consent to the sexual activity or if that person is under the age of 13 (statutory rape).<sup>85</sup> All offences are gender neutral. There is a maximum sentence of life imprisonment for an adult causing or inciting a child under the age of 13 to engage in sexual activity.<sup>86</sup> "Consent" means if a person "agrees by choice and has the freedom and capacity to make that choice".

The offence of sexual activity with a child aged 13 to 15 years carries a maximum sentence of 14 years.<sup>87</sup> The offence of sex by a youth under 17 on a child under 16 carries a maximum sentence of five years.<sup>88</sup>

### 4 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?

The basic premise is that offences against children will be more severely punished than offences against adults; however the maximum sentence that may be given to an offender for the rape of an adult or a child, on conviction on indictment, is life imprisonment. The following factors influence the severity of the punishment for rape offences.

#### 4.1 Culpability and Harm

According to the sentencing guidelines for the Crown Prosecution Service<sup>89</sup> the seriousness of the violation may depend on a number of factors, but the nature of the sexual behavior will be the primary indicator of the degree of harm caused in the first instance. The extreme youth or old age of a victim should be an aggravating factor. In addition, in principle, the younger the child and the greater the age gap between the offender and the victim, the higher the sentence should be. However, the youth and immaturity of

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85 Sexual Offences Act 2003, Sections 1 and 5.

86 Sexual Offences Act 2003, Section 8.

87 Sexual Offences Act 2003, Section 9.

88 Sexual Offences Act 2003, Section 13.

89 Crown Prosecution Service, "Sentencing Manual S1 Rape" (January 2012).

the offender must also be taken into account in each case. The planning of an offence indicates a higher level of culpability than an opportunistic or impulsive offence.

## 4.2 Aggravating & Mitigating Factors

The guideline judgment in *R v Millberry and others*<sup>90</sup> established the principle that judges should adopt the same starting point for ‘relationship rape’ or ‘acquaintance rape’ as for ‘stranger rape’. The Council has determined that the same principle should apply to all non-consensual offences although the particular circumstances in which the rape takes place may affect the sentence imposed.

Aggravating factors may include whether the offender ejaculated or caused the victim to ejaculate, background of intimidation or coercion, use of drugs, alcohol or other substance to facilitate the offence, threats to prevent the victim reporting the incident, abduction or detention, the offender being aware that he is suffering from a sexually transmitted infection or that pregnancy or infection results.

Mitigating factors may include whether the victim engaged in consensual sexual activity with the offender on the same occasion and immediately before the offence.

## 4.3 Sentencing Council Guidelines

The relevant Sentencing Council Guidelines are set out below and are effective for offences sentenced on or after 14 May 2007. The starting points are for an adult offender, of previous good character who was convicted after trial. It should also be noted that there is no distinction in the starting points for penetration of the vagina, anus or mouth.

TYPE/NATURE OF ACTIVITY	STARTING POINT (CUSTODY)	SENTENCING RANGE (CUSTODY)
Repeated rape of same victim over a course of time or rape involving multiple victims	15 years	13–19 years
Rape accompanied by any one of the following: abduction or detention; offender aware that he is suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; offence motivated by prejudice (race, religion, sexual orientation, physical disability); or sustained attack:		
– if the victim is under 13	13 years	11–17 years
– if the victim is a child aged 13 or over but under 16	10 years	8–13 years
– if the victim is 16 or over	8 years	6–11 years

90 *R v Millberry and others* (2003) 2Cr.App.R.(S) 31.

TYPE/NATURE OF ACTIVITY	STARTING POINT (CUSTODY)	SENTENCING RANGE (CUSTODY)
Single offence of rape by single offender:		
– if the victim is under 13	10 years	8–13 years
– if the victim is a child aged 13 or over but under 16	8 years	6–11 years
– if the victim is 16 or over	5 years	4–8 years

## 4.4 Relevant Sentencing Case Law

The following cases provide useful guidance to the courts when sentencing for rape offences in addition to the Sentencing Council Guidelines set out above.

Millberry set out that the courts should consider the degree of harm to the victim, the level of culpability of the offender and the level of risk proposed by the offender to society. While rape will always be a most serious offence, its gravity will depend upon the circumstances of the particular case.

In *R v Corran and others*<sup>91</sup> the court held that for the rape of a child under the age of 13, no precise sentencing guidance can be given. The appropriate sentence is likely to lie within a very wide bracket and there will be very few cases in which immediate custody is not called for, even in relation to a young offender. Where there is no question of consent having been given and where significant aggravating factors are present, it is likely that a long determinate sentence or a life sentence will therefore be called for. Although absence of consent is not an ingredient of the offence, presence of consent is material to the sentence given, particularly in relation to young defendants.

It should be noted that in *Masood*<sup>92</sup> and *Att-Gen’s Ref no 28 of 1997*,<sup>93</sup> the court declined to take any notice of the fact that the rape victims were prostitutes. It seems this approach is preferred to earlier decisions.<sup>94</sup>

## 4.5 Defences

In light of the Sexual Offences Act 2003<sup>95</sup>, a person under the age of 18 engaging in consensual sexual activity with a minor aged between 13 and 15 years may have a defence afforded to them if they had a reasonable belief that the minor was over 16

91 (2005) 2 Cr.App.R.(S) 73.

92 (1997) 2 Cr App R (S) 137.

93 2 Cr App R (S) 206.

94 Cole 1993 14 Cr App R (S) 764.

95 Sexual Offences Act 2003, Section 13 and Sections 9-12.

years of age. There is no defence of mistaken belief about the age of the child if that child is under the age of 13.

## 4.6 Registration of sex offenders

The sex offenders register contains the details of anyone convicted, cautioned or released from prison for sexual offence against children or adults since September 1997. Those on the register are required to notify the police if they change their name or address, and are also required to reveal any plans to travel outside the UK. Failure to comply is an offence. Offenders may also be barred from certain activities and areas frequented by children and tagged electronically.

## 5 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?

Prostitution itself is not a crime, but a number of related activities are crimes, including soliciting in a public place, kerb-crawling or owning or managing a brothel. It is an offence for a person (whether male or female) to persistently loiter or solicit in a street or public place for the purposes of offering services as a prostitute.<sup>96</sup> Conduct is persistent if it takes place on two or more occasions in any period of three months.<sup>97</sup>

In England and Wales it is an offence to pay for sex with a prostitute who has been subjected to force, threats (whether or not relating to violence) or any other form of coercion or deception. This is a strict liability offence meaning that the person paying for sex can be prosecuted even if they did not know that the prostitute was subjected to force.<sup>98</sup> The maximum penalty is a Level 3 fine (£1,000 (approximately US\$1,609)).

Children (under 18) involved in prostitution are primarily victims of abuse. Persons who take advantage of them are child abusers. It is an offence to: pay for sexual services of a child; cause or incite child prostitution or pornography; control a child prostitute or a child involved in pornography; or, arrange or facilitate child prostitution or pornography. Prostitution cases involving victims under 18 carry a higher penalty in the criminal courts. The maximum penalty for paying for the sexual services of a child is life imprisonment when the child is under the age of 13 and the offence involves penetration.<sup>99</sup> If the child is 13, 14 or 15 years old the maximum penalty is 14 years or seven years if the child is 16 or

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96 The Street Offences Act 1959, Section 1(1), as amended by Section 16 of the Policing and Crime Act 2009.

97 Section 1(4).

98 Sexual Offences Act 2003, Section 53A.

99 Sexual Offences Act, 2003, Section 47(3).

17 years old.<sup>100</sup> Consent of the child is irrelevant. A reasonable belief that the child was over 18 affords a defence if the child is 13 years old or over. There is no such defence if the child is aged 13 years or under.

The Sexual Offences Act 2003<sup>101</sup> creates three offences of trafficking for the purposes of sexual exploitation (trafficking into, within and out of the UK). A person commits an offence if he or she arranges or facilitates the travel of another person and intends to do anything in respect of that person, which if done, will involve the commission of a relevant offence. For these purposes, all serious sexual offences including exploitation of prostitution are included.<sup>102</sup> The sentencing ranges for these offences will be informed by the following aggravating and mitigating factors:

- (a) evidence of physical/mental coercion: two to five years' imprisonment;
- (b) no coercion or corruption but offender is closely involved in victim's prostitution: 26 weeks to two years' imprisonment; and
- (c) no coercion or corruption and the involvement of offender is minimal: non-custodial sentence.

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100 Sexual Offences Act 2003, Sections 47(4) & (5).

101 Sexual Offences Act 2003, Sections 57-59.

102 A relevant sexual offence is any offence under Part 1 of the Sexual Offences Act 2003.

# C GERMANY

## Preface<sup>103</sup>

### Historical background

The aspects of criminal law with regard to sexual offences have been fundamentally reviewed in the 1970s when the grounds for the criminal nature have been shifted away from moral standards towards detrimental social effects.

### Subject of legal protection

Subject of legal protection is the sexual self-determination (sexuelle Selbstbestimmung) of a person, i. e. that a person may not become the object of sexual desires of others against its will. With regard to minors, protection is extended, in broad terms, to allow their untroubled sexual development and their unimpaired overall development. The perused purpose of later statutory reforms focused strongly on, inter alia, the enhancement of the protection of minors.

### Definitions of minor, child, and juvenile vs. adults

In general, a minor is a person under the age of 18 and an adult of the age of 18 or older. A child is a person under the age of 14. A juvenile is a person of the age of at least 14, but under the age of 18. Girls and boys are treated equally.

### European/Universal legal efforts

The European legislation has implemented its effort to harmonise the protection of children and juveniles against sexual exploitation by resolving unified ranges of punishment in relation thereto which were implemented in national law. However, protection of minors in this respect seems to remain on the agenda for further improvements by means of legislation. Regardless of the victim's age, courts extract from the right of privacy according to Article 8 para. 1 of the European Convention on Human Rights that the member states have to provide sufficient legal protection against sexual assaults.

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103 References to any law/convention are to those as applicable/in force on 28 January 2013.

The Federal Republic of Germany as a ratifying member of the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour commits itself to taking immediate action to prohibit and eliminate the worst forms of child labour. It has further ratified the Convention on Action against Trafficking in Human Beings at the end of last year, however, entry into force is envisaged for later this year.

## Principle of sexual acts of some relevance

In order to exclude socially accepted forms of personal intimacies like embracing or kissing someone on the cheeks, penalised sexual acts and activities shall only be those which are of some relevance in relation to the protected right of sexual self-determination (see § 184g para. 1 German Criminal Code<sup>104</sup> (Strafgesetzbuch, “StGB”). The degree of legal wrong may, in general, be established by the form and kind, intensity and duration of the sexual action.

## Principle of universal prosecution (Weltrechtsprinzip)

Regardless of the applicable law of where the act was (physically) committed, the German Criminal Code declares itself being applicable for certain abuses against sexual self-determination (see § 5 no. 8 StGB), if the offender and the victim are German nationals at the time of the offence and having their main livelihood in the Federal Republic of Germany and in other certain offences, in particular sexual abuse against children and juveniles, if the offender is a German national.

### 1 Mental suffering as defined by legislation and the associated evidentiary requirements.

Mental suffering is not a legal term in order to establish an offence against sexual self-determination. It can be rather viewed at as it being assumed that every victim of such an offence suffering mentally which is, inter alia, why such acts are penalised. However, the degree of mental suffering may be one of more criteria to establish the individual sentencing.

In the light of question 2, below, mental suffering is established from a medical point of view, in principle by means of a medical opinion. Mental suffering would, in principle, be examined in the light of post-traumatic stress disorder.

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104 Please note that a non-binding English translation of the German Criminal Code is published by the Federal Ministry of Justice (Bundesministerium der Justiz) on [www.gesetze-im-internet.de/englisch\\_stgb/index.html](http://www.gesetze-im-internet.de/englisch_stgb/index.html) (as of 28 January 2013). However, please also note the published disclaimer.

## 2 The compensation regime for rape victims suffering from mental illness (noting the types of situations in which a rape victim who has suffered mentally from their ordeal is entitled to compensation and how such compensation is calculated).

In principle, the offender is liable for damages caused under civil law aspects. However, the civil law claims are transferred by law (see § 5 Crime Victims Compensation Law, Opferentschädigungsgesetz, “OEG”) to the State as the statutory compensation regime (see § 1 para. 1 OEG) in place grants any victim of an intentional, unlawful violent assault against such victim or another person or because of the victim’s lawful defence who suffers health damages thereof a compensation for the consequences in terms of health and economics by means of support analogous to the provisions of the Federal Support Law (Bundesversorgungsgesetz). An eligible victim is, in principle, each German citizen against whom the offence was committed within the boundaries of the Federal Republic of Germany and certain foreign citizens (see in particular § 1 paras. 1 and 4 OEG). Such state responsibility is seen as a consequence of the incapability of the State to protect its citizens from a violent assault and the manifestation of the welfare state principle according to Articles 20 and 28 of the German constitution<sup>105</sup> (Basic Law, Grundgesetz, “GG”).

Thus, the penalised offences against sexual self-determination do not qualify automatically for state compensation as conditions are similar but not identical. However, it should be noted that the condition “violent” does not imply for the offender to use noteworthy violence in order to overcome the resistance of the victim. It is sufficient when the physical integrity of the victim was unlawfully damaged. Conversely, the mere mental damage without a physical attack would not be covered even though the victim would suffer mentally.

As regards mental suffering, monetary compensation is, in simple terms, calculated on the basis of the degree of suffering in connection with the degree of reduction in earning capacity, i.e. the victim is granted a state pension, usually a percentage rate compensating such reduced earning capacity. However, compensation is to be reduced in the light of any consequence caused by any damage, which already existed at the time of the incident, and certain other income of the victim by applying certain exception amounts and maximum allowance which are adjusted regularly to current support standards. Such compensation statement may be revisited over the years.

Noteworthy, services of non-profit organisations also offer help to overcome the consequences of the offence in many practical ways (e. g. providing general information on rights, mental support by listening and encouraging in overcoming the incident or help in how to communicate with state authorities).

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<sup>105</sup> Please note that a non-binding English translation of the German constitution is published by the Federal Ministry of Justice (Bundesministerium der Justiz) on [www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) (as of 28 January 2013). However, please also note the published disclaimer.

### 3 The age of consent and the punishment for engaging in under-age sex (including whether claiming not to have known that the victim was underage can be relied on as a defence).

In principle, the legal offence for engaging in under-age coitus/sex (Beischlaf), being one form of sexual abuse, and possible defences are to be viewed systematically with regard to the age of the victim and the age of the offender:

(a) Offender of full legal age and subject to (b) below

**Range of punishment:** The term coitus/sex (Beischlaf) is used in the German Criminal Code with regard to children and adult victims leading to a range of punishment of imprisonment of not less than two years (see § 176a para. 2, no. 1 and § 177 para. 2 no. 1 StGB) whereas the fact pattern of sexual abuse with regard to juvenile-victims is described differently (see § 182 StGB) so that a statutory range of punishment for such special form of sexual abuse may not be given. Please note further elaboration below.

**Consent/Defence:** Concerning a child-victim, defence regarding consent of a child is irrelevant/not allowed. The sexual self-determination of a child is neither to its nor someone else's disposition. Such approach is based on the intention of absolute protection of a child's development and the belief that a child may not have the necessary capacity of discernment and capacity to control its actions. Defence regarding ignorance or error in the age of the victim has to be investigated diligently. Since the offender has to act at least with contingent intent (dolus eventualis) regarding the age of the victim, the intent lapses if the offender has not given the age of the victim any consideration. In this case, the physical development and appearance of the child as of the date of the offence have to be determined. The (legitimate) false assumption of an older age of the victim is considered to be an error of factual circumstances which would lead to the applicability of the offence against a juvenile-victim (see §§ 16 para. 1 sentence 1, 182 StGB).

Concerning a juvenile-victim, no defence regarding later approval of the act may be possible as in principle there cannot be any valid agreement that the offender may abuse the victim. However, an upfront-consent might be possible. The offender needs to have acted with at least dolus eventualis with regard to the protected age and the dilemma the victim is placed in. The court would need to establish in every single case that the victim was intellectually capable in agreeing to the interaction and that such was done on voluntary grounds. Reason is that not each and any sexual interaction of juveniles may be penalised but, in principle, only if such is undertaken due to duress or material seduction. Criteria like a significant difference in age between the offender and the victim, the form of interaction or the social

surrounding may be investigated in order to conclude whether or not a (valid) consent may be presumed.

(b) **Underage offender**

The German Criminal Code reflects the decision to decriminalise juvenile offenders where a juvenile is viewed at as up to 21 years of age, however, systematically differentiating the description of offence whether the offender was under or over the age of 18.

**Range of punishment:** The range of punishment is imprisonment not exceeding five years or imprisonment not exceeding three years or a fine, as the case may be (see § 182 StGB).

**Consent/Defence:** In principle, the same consideration applies as set out under (a) above.

## **4 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?**

The idealist approach of German criminal law is to describe circumstances in such a detailed and precise way that any person may know whether or not a certain behaviour is penalised and which punishment one may expect by the mere codified words. The protection of minors is primarily established by extending the penalised circumstances. In addition, the rights of a child, e. g., are protected absolutely which means that no defences are permissible.

As regards the aspect of differentiating the severity of punishment depending on the age of the victim (minor vs. adult), such result may be difficult to establish as the offences are not in all means directly comparable as elaborated further below. On a high-level consideration and regardless of whether or not such age-differentiating consideration by the legislator has been, which we are not aware of, or would be undertaken, it would need to be viewed in the light of the fundamental right that every person shall have the right to life and physical integrity according to Article 2 para. 2 GG which values the equality of people. In principle and despite the likely non-direct applicability, the idea of reverse-equality might be drawn from the European non-discrimination rule according to Article 19 Treaty on the Functioning of the European Union (Vertrag über die Arbeitsweise der Europäischen Union) whereas deviation would need to be accompanied by good reason.

In addition, experts discuss controversially whether or not a regime of more severe punishment would actually be efficient in leading to a lower number of criminal cases in general. On a different note worth considering, the historical legal structure of punishment for certain so-called minor-severe cases, however not linked to the age of the victim, were abandoned and the legal regime restructured paying tribute

to the emotions and feelings of the victim not having to face a court procedure examining whether or not such individual case is minor-severe as for the victim the experience is severe in any case.

With regard to “rape” the German Criminal Code follows a differentiated approach. Chapter thirteen of the German Criminal Code covers offences against sexual self-determination which are not systematically set up but may, in broad terms, be categorised as (i) offences for the protection of minors, (ii) core sexual offences, (iii) offences related to pornography, (iv) offences related to prostitution, and (v) further sexual offences. Respect to the victim’s age is contributed by distinguishing partially between children and juveniles.

Depending on, including but not limited to, the nature of the offence, the severity of the offence, the age of the victim, the age of the delinquent, the duration during which repeated offences occur, and the behaviour of the victim of the offence, the codified range of punishment may vary within the establishment of a certain offence.

The offences originating from cause of the protection of minors are as follows:

- (a) **Abuse of position of trust (§ 174 StGB)**  
Codified range of punishment: imprisonment from three months to five years or imprisonment not exceeding three years or a fine or a discharge if, under consideration of the conduct of the person, the harm of the offence is of a minor nature, as the case may be;
- (b) **Child abuse (§ 176 StGB)**  
Codified range of punishment: imprisonment from six months to ten years or imprisonment of not less than one year or imprisonment from three months to five years, as the case may be;
- (c) **Severe child abuse (§ 176a StGB)**  
Codified range of punishment: imprisonment of not less than one year or imprisonment of not less than two years or imprisonment of not less than two years or imprisonment from three months to five years or imprisonment of not less than five years, as the case may be;
- (d) **Child abuse causing death (§ 176 b StGB)**  
Codified range of punishment: imprisonment for life or not less than ten years;
- (e) **Causing minors to engage in sexual activity (§ 180 StGB)**  
Codified range of punishment: imprisonment not exceeding three years or a fine or imprisonment not exceeding five years or a fine, as the case may be;
- (f) **Abuse of juveniles (§ 182 StGB)**  
Codified range of punishment: imprisonment not exceeding five years or imprisonment not exceeding three years or a fine or a discharge if, under consideration of the conduct of the person, the harm of the offence is of a minor nature, as the case may be;

- (g) [Distribution of pornography \(§ 184 StGB\)](#)  
Codified range of punishment: imprisonment not exceeding one year or a fine;
- (h) [Distribution, acquisition and possession of child pornography \(§ 184b StGB\)](#)  
Codified range of punishment: imprisonment from three months to five years or imprisonment of six months to ten years or imprisonment not exceeding two years or a fine, as the case may be;
- (i) [Distribution, acquisition and possession of juvenile pornography \(§ 184c StGB\)](#)  
Codified range of punishment: imprisonment not exceeding three years or a fine or imprisonment of three months to five years or imprisonment not exceeding one year or a fine, as the case may be;
- (j) [Distribution of pornographic performances by broadcasting, media services or telecommunications services \(§ 184d StGB\)](#)  
Codified range of punishment: same as set out in §§ 184 to 184c StGB; and
- (k) [Prostitution likely to corrupt juveniles \(§ 184f StGB\)](#)  
Codified range of punishment: imprisonment not exceeding one year or a fine.

In order to provide a basis for the regime of range of punishment codified with regard to other offences against the sexual self-determination, some provisions are listed exemplarily:

- (a) [Sexual assault \(§ 177 para. 1 StGB\)](#)  
Codified range of punishment: imprisonment of not less than one year;
- (b) [Rape \(§ 177 para. 2 StGB\)](#)  
Codified range of punishment: imprisonment of not less than two years;
- (c) [Cases of severe or minor nature of sexual assault or rape \(§ 177 paras. 3 et seqq. StGB\)](#)  
Codified range of punishment: imprisonment of not less than three years or imprisonment of not less than five years or imprisonment from six months to five years or imprisonment from one to ten years, as the case may be; and
- (d) [Sexual assault by use of force or threat of force and rape causing death \(§ 178 StGB\)](#)  
Codified range of punishment: imprisonment for life or not less than ten years.

Thus, the legal structures of offences concerning adult victims on the one hand and under-age victims on the other, are not identical and therefore it is not possible to establish directly whether punishments for offences against under-age victims would be more severe than punishments for offences against adult victims. However, comparing the range of punishment of child abuse causing death (§ 176 b StGB) and of sexual assault by use of force or threat of force and rape causing death (§ 178 StGB) such range is the same, i. e. imprisonment for life or not less than ten years. Whereas the fact pattern for sexual assault against a child penalises any engagement in sexual activity, those penalised sexual engagements with a victim of full legal age are to be accompanied by further circumstances like violence or threat. A comparison of the range

of punishment is difficult to establish due to those different fact patterns. Examining rape, i. e. in the narrow meaning of coitus/sex (Beischlaf) and where explicitly stated as such in the German Criminal Code, the range of punishment is the same regardless of the age of the victim, i. e. imprisonment of not less than two years (see § 176a para. 2, no. 1 and § 177 para. 2 no. 1 StGB) provided that the offender is an adult. Notably is, however, that repeat offenders of certain sexual abuses of children entail a sentence of imprisonment of not less than one year if the offender was convicted of such a category of offence by final judgment within the previous five years (§ 176a StGB). Such provision is a suppression of the fundamental principle of guilt-offence-adequacy (Tatschuldprinzip) which leads to special care in applying such.

## **5 Is prostitution a crime? If so, what is the difference in punishment for rape and punishment for prostitution?**

No, prostitution is not a crime.

In fact, prostitution was granted civil protection at the end of 2001 so that sexual conduct is no longer considered contra bonos mores and for this not illegal. Thus, service charges may be enforced under civil law.

Criminal offences in connection with prostitution apply for exploitation perpetrated against prostitutes (§ 180a StGB).

## D HONG KONG

### 1 Mental suffering as defined by legislation and associated evidentiary requirements

#### 1.1 Criminal and Law Enforcement Injuries Compensation Scheme

Under Hong Kong law there is no separate definition of mental suffering. However, the Criminal Injuries Compensation Board, which administers the Criminal and Law Enforcement Injuries Compensation Scheme (as described below), will take into account not only the physical injuries of victims of sexual offences when assessing their degree of disability, but also their mental suffering as assessed by the medical authorities.<sup>106</sup>

#### 1.2 Civil and Criminal Claims

The Criminal and Law Enforcement Injuries Compensation Scheme does not affect the applicant's right to pursue claims for damages through civil proceedings<sup>107</sup> or any other compensation in parallel with a claim under the scheme in respect of the same incident. However, applicants who receive damages or other compensation outside the scheme in respect of the same incident will be required to refund either the payments they have received from the scheme or the amount of damages or compensation, whichever is less (i.e. there is no double recovery).

The position is substantially similar to that in England and Wales, including with respect to claims for psychiatric injury (see description at Section B of this Study).

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106 Criminal and Law Enforcement Injuries Compensation Boards, "39th Annual Report for the year ending 31 March 2012" (2012).

107 In Hong Kong, the Legal Aid Ordinance makes provision for the granting of legal aid in civil actions to persons of limited means. However, supplementary legal aid under Section 5A of the Legal Aid Ordinance is not available for claims in the Court of First Instance or District Court for damages for assault and battery. These constitute "excepted proceedings" under Part II of Schedule 3 to the Legal Aid Ordinance.

## 2 Compensation regime for rape victims suffering from mental injury

### 2.1 Criminal and Law Enforcement Injuries Compensation Scheme

#### 2.1.1 Overview.

The aim of the Criminal and Law Enforcement Injuries Compensation Scheme is to provide cash assistance to those who are injured, disabled or killed as a result of a crime of violence. Payments under the scheme are made from public funds.

The Criminal Injuries Compensation Board will consider an application for compensation where the applicant sustained personal injury directly attributable to a crime of violence, subject to it being satisfied that:

- (a) the victim sustained permanent disability from the incident, or the injury sustained by the victim gave rise to at least three days' hospitalization or sick leave as certified by a registered medical practitioner;
- (b) the circumstances of the injury or death have been the subject of criminal proceedings or were reported to the police without unreasonable delays;
- (c) the applicant has given the Criminal Injuries Compensation Board all related information and reasonable assistance, particularly in relation to any medical reports which it may require;
- (d) the claim for compensation has been made within three years of the date of the incident; and
- (e) the victim is a person with the right to remain in Hong Kong or permitted to remain in Hong Kong under the Immigration Ordinance, who was not in contravention of a limit of stay at the time of the incident.

The decision as to whether an application is approved or rejected will be taken by the Criminal Injuries Compensation Board, which will also decide whether there are any special circumstances which justify increasing or reducing the normal amount of compensation payable.

In the year ending 31 March 2012, 40 cases of sexual assault were reported to the police and only one application was made with respect to these under the Criminal and Law Enforcement Injuries Compensation Scheme.<sup>108</sup>

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108 Criminal and Law Enforcement Injuries Compensation Boards, "39th Annual Report for the year ending 31 March 2012" (2012).

## 2.1.2 Appeals.

An applicant may appeal against the decision of the Criminal Injuries Compensation Board within one month after the date of notification and ask for his or her case to be reviewed by an appeal board. In exceptional cases and subject to the approval of the appeal board, the applicant may be legally represented at his or her own expense.

## 3 Calculation of Compensation

The compensation awarded by the Criminal Injuries Compensation Board, which normally takes the form of a lump sum cash payment, is based on the rates of compensation paid under the Emergency Relief Fund. The types of payment, as well as the amounts and conditions, are set out in the Payment Schedule of the Emergency Relief Fund, which is adjusted regularly:

### Payment Schedule<sup>109</sup>

GRANT	LEVEL OF GRANT	CONDITION OF GRANT
<b>DISABILITY GRANT</b>	From HK\$147 (≈US\$19) up to a maximum of HK\$146,760 <sup>110</sup> (≈US\$18,930)	–
<b>INJURY GRANT</b>	From HK\$580 (≈ US\$75) to a maximum of HK\$48,300 (≈US\$6,230) depending on injury	Assessed according to number of days sick leave/hospitalization; maximum 180 days; no double pay.
<b>INTERIM GRANT</b>	From HK\$340 (≈US\$44) up to a maximum of HK\$61,140 (≈US\$7,886)	Assessed according to the number of days sick leave/hospitalization; maximum of 180 days; available to wage earner suffering loss of earnings or parent of minor.

Notwithstanding the amounts and conditions set out in the Payment Schedule of the Emergency Relief Fund, the Criminal Injuries Compensation Board has the power to increase or reduce the amount of compensation, or to reject the application altogether, depending on the circumstances of the case. In particular, the Criminal Injuries

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109 Criminal and Law Enforcement Injuries Compensation Scheme Payment Schedule for incidents occurring on or after 1 April 2012.

110 Based on the Employees' Compensation Ordinance, Cap. 282, First Schedule or Section 9(1)(b); abated to 2/3 for persons aged 60 and over.

Compensation Board may, on compassionate grounds, increase the disability grant, the injury grant and/or the interim maintenance grant payable to a victim of rape by up to 100%. The compensation may also be reduced or refused if the conduct, character and way of life of the victim were contributory factors to the incident.

## 4 The age of consent and the punishment for engaging in under-age sexual activity

The age of consent is 16 for intercourse with a girl (unless the man believes her to be his wife and has reasonable cause for such belief, in which case the age of consent will be 13)<sup>111</sup> and 21 for homosexual buggery or buggery with a girl.<sup>112</sup> The age for consent for buggery is currently subject to review as described below.<sup>113</sup> There is no specific age of consent applicable to a male in the case of acts of heterosexual intercourse.<sup>114</sup>

As noted in paragraph 5.1.4 below, the Hong Kong courts have held that the exact age of the girl and the accused are relevant to sentencing. The sentence will typically be more severe if the girl is under the age of 13. If older, a sentence of imprisonment of between six and 18 months will fall for consideration. If both the complainant and the accused are young, the court may be able to adopt a more lenient approach, particularly if they are in a boy/girl relationship.<sup>115 116</sup>

The courts in Hong Kong have considered whether the common law defence of mistaken belief applies to offences for engaging in under-age sex. In *HKSAR v So Wai-lun*<sup>117</sup> the prosecution successfully appealed against the decision of a magistrate to acquit the accused of unlawful intercourse with a girl under the age of 16. This followed the magistrate's ruling that it was a defence for the accused to prove, on the balance of probabilities, that he did not know and had no reason to suspect that the girl was under the age of 16. The Court of Appeal decided that the intention had been to create an offence of absolute liability, with the policy of the legislation being "the protection of young girls from sexual abuse, this being in the public interest".<sup>118</sup>

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111 Crimes Ordinance, Section 123 and Section 124.

112 Crimes Ordinance, Sections 118C and 118D.

113 The Law Reform Commission of Hong Kong, Review of Sexual Offences Sub-Committee, Consultation Paper, Rape and Other Non-Consensual Sexual Offences, September 2012.

114 Although a female cannot be charged under Section 124 of the Crimes Ordinance for heterosexual intercourse with a male under 16, she can be charged under Section 146 of the Crimes Ordinance for committing an act of gross indecency with a child under 16. It is not a defence to prove that the child consented to such act of gross indecency. The maximum sentence, on conviction on indictment, is imprisonment for 10 years. A person is not guilty of an offence under Section 146 of the Crimes Ordinance if he or she is, or believes on reasonable grounds that he or she is, married to the child.

115 I. Grenville Cross, Patrick W. S. Cheung, Elaine Yi-lan Tsui, Sentencing in Hong Kong, 2011.

116 Section 12 of the Statute Law (Miscellaneous Provisions) Ordinance 2012 abolished the irrebuttable common law presumption in Hong Kong that a boy under the age 14 is incapable of sexual intercourse. Prior to the abolition of this presumption, a boy under the age of 14 could not be found guilty of rape.

117 HCMA 39 of 2004.

118 [www.doj.gov.hk/eng/public/pdf/pd2004/pd2004-5.pdf](http://www.doj.gov.hk/eng/public/pdf/pd2004/pd2004-5.pdf)

## 5 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?

### 5.1.1 Existing Legislation

The basic premise is that offences against children will be more severely punished than offences against adults; however the maximum sentence that may be given to an offender for the rape of an adult or a child, on conviction on indictment, is life imprisonment.<sup>119</sup> This applies to rape, buggery with a girl under 21 and intercourse with a girl under 13.<sup>120</sup> In the case of sexual intercourse with a girl under 16 not constituting rape, the maximum sentence is five years' imprisonment.<sup>121</sup> As noted in paragraph 5.1.3 below, the involvement of a young victim is an aggravating factor that a court is entitled to consider when sentencing.

### 5.1.2 Reform of Existing Legislation

The existing legislation, which is based on English legislation dating back to 1956,<sup>122</sup> is currently under review. A consultation paper was issued in September 2012<sup>123</sup> and the main recommendations were:

- (a) creation of a statutory definition of "consent" to sexual activity which reflects the need for free and voluntary agreement to the sexual activity and the capacity to consent;<sup>124</sup>
- (b) a newly-defined offence of rape which can be committed against a person of either sex and covers penile penetration of the vagina, anus or mouth;
- (c) a reformed mental element with regard to the issue of "consent", moving away from a focus simply on the subjective belief of the accused as to whether the complainant consented, to a mixed test of subjectivity and objectivity. Currently, if an accused subjectively holds a genuine belief that the complainant consented, the accused is entitled to be acquitted even if that belief was unreasonable;

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119 Crimes Ordinance, Section 118.

120 Crimes Ordinance, Sections 118, 118D and 123.

121 Crimes Ordinance, Section 124.

122 Sexual Offences Act, 1956.

123 The Law Reform Commission of Hong Kong, Review of Sexual Offences Sub-Committee, Consultation Paper, Rape and Other Non-Consensual Sexual Offences, September 2012.

124 It is noted in The Law Reform Commission of Hong Kong, Review of Sexual Offences Sub-Committee, Consultation Paper, Rape and Other Non-Consensual Sexual Offences, September 2012 that the Crimes Ordinance provides no definition of consent and offers little guidance. The lack of a statutory definition of consent is aggravated by the complexity of the case law on the issue. The advantage of having a statutory definition of consent is the achievement of some degree of certainty and clarity. The principal argument against such a definition is that it removes an element of flexibility which judicial interpretation allows.

- (d) abolition of the offence of “non-consensual buggery”, so that the conduct which is the subject of such an offence would be covered in future by the gender neutral offence of rape;
- (e) creation of a new offence of “sexual assault by penetration” to cater for the more serious forms of conduct, not constituting rape, and currently covered by the offence of “indecent assault”;
- (f) substituting the offence of “indecent assault” with a new offence of “sexual assault” focusing on conduct which is “sexual” rather than “indecent”, with a proposed definition of “sexual”; and
- (g) abolition of the offence of procuring another to do an unlawful sexual act by the use of threats or intimidation<sup>125</sup> and the creation of the offence of “causing a person to engage in sexual activity without consent”.

### 5.1.3 Aggravating/Mitigating Factors

Hong Kong courts have approved nine aggravating factors relevant to sentencing in rape cases. These are:<sup>126</sup>

- (a) the use of violence over and above the force necessary to commit the rape;
- (b) use of a weapon to frighten or injure the victim;
- (c) the offence was planned;
- (d) an especially serious physical or mental effect on the victim, for example, a rape resulting in pregnancy or in transmission of a life-threatening or serious disease;
- (e) further degradation of the victim, for example, by forced oral sex or urination on the victim;
- (f) the offender had broken into or otherwise gained access to the place where the victim was living;
- (g) the presence of children when the offence was committed;
- (h) the covert use of a drug to overcome the victim’s resistance and/or obliterate his or her memory of the offence; and
- (i) a history of sexual assaults or violence against the victim.

It has further been established that the use of forced, unprotected sex upon a victim who

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<sup>125</sup> Crimes Ordinance, Section 119.

<sup>126</sup> R v Millberry (2003) 1 WLR 546, 555 (see also HKSAR v Lau Chin-yu (2007) 1 HKC 104).

insisted on protected sex,<sup>127</sup> repeated rapes and sexual perversion, the involvement of a young victim<sup>128</sup> and mental retardation of the victim<sup>129</sup> are also all aggravating factors that a court is entitled to consider when sentencing.

## 5.1.4 Sentencing Guidelines

Sentencing principles and guidelines developed in England and Wales have from time to time assisted the Court of Appeal in Hong Kong in its development of sentencing guidelines.<sup>130</sup> English rape guidelines were adapted for local use by way of case law in 1989<sup>131</sup> and again in 2007.<sup>132</sup> The table below provides guidance to the sentencing for sexual offences.<sup>133</sup>

### Sentencing Guidelines<sup>134</sup>

OFFENCE	MAXIMUM PENALTY	CUSTOMARY PENALTY
<b>ADMINISTERING A DRUG TO FACILITATE AN UNLAWFUL ACT (S.121)</b>	14 years' imprisonment	–
<b>HOMOSEXUAL BUGGERY WITH BOY AGED 21 OR UNDER (S.118C(A))</b>	Life imprisonment	Although no tariff, a substantial sentence of imprisonment will invariably be appropriate.
<b>BUGGERY WITH GIRL UNDER 21 (S.118D)</b>	Life imprisonment	A substantial sentence of imprisonment will invariably be appropriate.
<b>INCEST BY MEN (S.47)</b>	14 years' imprisonment for a man who has sexual intercourse with a woman who to his knowledge is his granddaughter, daughter, sister or mother. If the victim is under the age of 16 but above the age of 13, sentence rises to 20 years' imprisonment. If the victim is under the age of 13, the maximum sentence is life imprisonment	Sentences should both punish and deter. Depending on age of victim, sentences regularly run from imprisonment of between six and 10 years. Offence will be aggravated if intercourse occurred over a long period, if force is used, if pregnancy results or if the victim is very young.

127 HKSAR v Chan Sau-man (2001) 3 HKLRD 593, 606.

128 HKSAR v Hui Ka-sang (2000) 2 HKLRD 718.

129 HKSAR v Lau Chin-yu (2007) 1 HKC 104, 114.

130 I. Grenville Cross, Patrick W. S. Cheung, Elaine Yi-lan Tsui, Sentencing in Hong Kong, 2011.

131 Attorney General v Ip Chung-hang (1989) 1 HKLR 149, 152.

132 HKSAR v Lau Chin-yu (2007) 1 HKC 104.

133 I. Grenville Cross, Patrick W. S. Cheung, Elaine Yi-lan Tsui, Sentencing in Hong Kong, 2011.

134 Section references in this table are references to the Crimes Ordinance.

OFFENCE	MAXIMUM PENALTY	CUSTOMARY PENALTY
<b>RAPE (S.118)</b>	Life imprisonment	A starting point of at least five years' imprisonment is invariably appropriate. If aggravating factors are present, the sentence can escalate to 10 years or more.
<b>UNLAWFUL SEXUAL INTERCOURSE WITH AN UNDER-AGE GIRL</b>	If girl is under the age of 13, the maximum penalty is life imprisonment (s.123) If girl is under the age of 16, the maximum penalty is five years' imprisonment (s.124)	Age of the girl and accused is relevant to sentencing. The sentence will typically be more severe if the girl is under the age of 13. If older, a sentence of imprisonment of six to 18 months will fall for consideration. If both the girl and the accused are young, the court may be more lenient, particularly if in a relationship.
<b>UNLAWFUL SEXUAL INTERCOURSE WITH A MENTALLY INCAPACITATED PERSON</b>	10 years' imprisonment	Imprisonment. Even first offenders must expect to receive a deterrent sentence.

## 6 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?

Prostitution itself is not an offence, but a number of activities which may relate to organized prostitution are crimes,<sup>135</sup> including procuring another to do an unlawful sexual act by the use of threats or intimidation,<sup>136</sup> exploitation of others for sexual purposes and trafficking persons to or from Hong Kong,<sup>137</sup> control over persons for

135 The Law Reform Commission of Hong Kong has expressed the view that it is not entirely clear that offences relating to prostitution should be considered as "sexual offences" and that, in most cases, they are not truly sexual offences (see The Law Reform Commission of Hong Kong, Review of Sexual Offences Sub-Committee, Consultation Paper, Rape and Other Non-Consensual Sexual Offences, September 2012). They may in fact be more properly classified as offences against public disorder or involving public nuisance (eg, the offence of keeping a vice establishment under Section 139 of Crimes Ordinance does not involve conduct forming any of the ingredients of a typical sexual offence). Instead, the keeping of a vice establishment may more appropriately be seen as an affront to public order or as a source of nuisance to the community.

136 Under the Crimes Ordinance, Section 119, a person who procures another person, by threats or intimidation, to do an unlawful sexual act is guilty of an offence and liable on conviction on indictment to imprisonment for 14 years.

137 Under the Crimes Ordinance, Section 129, a person who takes part in bringing another person into, or taking another person out of, Hong Kong for the purpose of prostitution is guilty of an offence and liable on conviction on indictment to imprisonment for 10 years.

the purpose of prostitution,<sup>138</sup> causing prostitution,<sup>139</sup> detention for intercourse or in a vice establishment,<sup>140</sup> living on the earnings of prostitution of others,<sup>141</sup> keeping a vice establishment,<sup>142</sup> soliciting for an immoral purpose,<sup>143</sup> and advertising prostitution.<sup>144</sup>

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138 Under the Crimes Ordinance, Section 130, a person who exercises control or influence over another person for the purpose or with a view to that person's prostitution is guilty of an offence and liable on conviction on indictment to imprisonment for 14 years.

139 Under the Crimes Ordinance, Section 131, a person who procures another person to become a prostitute is guilty of an offence and liable on conviction on indictment to imprisonment for 10 years.

140 Under the Crimes Ordinance, Section 134, a person who detains another person against her or his will in any place kept as a vice establishment is guilty of an offence and liable on conviction on indictment to imprisonment for 14 years.

141 Under the Crimes Ordinance, Section 137, a person who knowingly lives on the earnings of prostitution of another is guilty of an offence and liable on conviction on indictment to imprisonment for 10 years.

142 Under the Crimes Ordinance, Section 139, a person who keeps or manages any place as a vice establishment is guilty of an offence and liable on summary conviction to imprisonment for 3 years and, on conviction on indictment, 10 years.

143 Under the Crimes Ordinance, Section 147, a person who in a public place or in view of the public solicits for any immoral purpose, or loiters for the purpose of soliciting, is guilty of an offence and liable on conviction to a fine of HK\$10,000 (approximately US\$1,290) and to imprisonment for 6 months.

144 Under the Crimes Ordinance, Section 147A, a person who publicly displays, or permits the public display of, a sign that advertises the services of a prostitute or of a person who arranges prostitution is guilty of an offence and liable on conviction to imprisonment for 12 months.

# E PEOPLE'S REPUBLIC OF CHINA ("PRC")

## 1 Mental suffering as defined by legislation and associated evidentiary requirements

### 1.1 Criminal Claims

Pursuant to the current PRC Criminal Law, PRC Criminal Procedure Law and relevant regulations<sup>145</sup> and official replies from the Supreme People's Court of China, a PRC court only supports the claim of material loss made by a victim of crime and will not accept a collateral civil suit brought by the victim for mental suffering resulting from his/her ordeal during the criminal proceedings. This is applicable to victims of rape and therefore rape victims are not able to make a claim for mental injury compensation during the criminal procedure.<sup>146</sup>

### 1.2 Civil Claims

Although rape victims cannot claim mental suffering in a collateral civil suit during the criminal proceedings, the victim can bring a tort claim in a civil court separately. Article 22 of the PRC Tort Law provides that where any harm caused by a tort to a personal right or interest of a person inflicts serious mental distress on such person, he or she may demand compensation for the infliction of mental distress. Article 8 of the Interpretation of the Supreme People's Court on Ascertainment of Compensation Liability for Mental Injury in Civil Torts ("**Interpretation on Compensation Liability for Mental Injury**") further provides that, in the case of tortious acts to a person which cause mental suffering with serious consequences, the people's court may order compensation for mental injury (in addition to an order regarding cessation of infringement, rehabilitation of reputation, elimination of ill effects and/or extension of apology, subject to the victim's claim).

Neither the PRC Tort Law nor the Interpretation on Compensation Liability for Mental Injury provides a description of mental illness or guidance as to proving the mental suffering of a victim. In practice, the people's court may require the victim to prove his or her mental injury by providing a psychiatric diagnosis issued by a designated medical institution.

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145 Article I of the Regulations of the Supreme People's Court on the Scope of Civil Suit Collateral to Criminal Proceedings.

146 Criminal Procedure Law, Article 77; Regulations of the PRC Supreme People's Court on the Scope of Civil Suit Collateral to Criminal Proceedings, Paragraph (2) of Article 1; Official Reply of the PRC Supreme People's Court on Whether the People's Courts Shall Accept Civil Suits for Mental Injury Compensation Brought by the Victims in Criminal Cases.

## 2 Compensation regime for rape victims suffering from mental injury

According to Article 9 of the Interpretation on Compensation Liability for Mental Injury, the compensation for mental injury (if awarded) may include the following:

- (a) compensation for disability;
- (b) compensation for death; and
- (c) compensation for injuries in other forms.

However, it is not clear how to determine the degree of disability and what other forms of compensation are available under the Interpretation on Compensation Liability for Mental Injury.

## 3 Calculation of Compensation

### 3.1 Factors the Court Considers to Determine Compensation

Article 10 of the Interpretation on Compensation Liability for Mental Injury provides that the following factors shall be taken into account when determining the amount of compensation awarded to a victim for his or her mental injury:

- (a) seriousness of the offence;
- (b) specific circumstances regarding the offence (including means, occasion and manner);
- (c) consequences to the victim;
- (d) circumstances regarding earnings gained through the offence;
- (e) financial capability of the offender; and
- (f) the average standard of living in the area where the court trying the case is located.

The Interpretation on Compensation Liability for Mental Injury does not set out a specific compensation tariff. In practice, the people's court has discretion to determine the amount of compensation awarded for mental injury on a case-by-case basis.

## 4 The age of consent and the punishment for engaging in under-age sexual activity

The age of consent to any form of sexual activity in the PRC is 14 for women (under PRC law men cannot be rape victims, regardless of the age of the victim). Children under the age of 14 are classed as not being legally able to give their consent to any form of sexual activity. Rape occurs if one person does not consent to the sexual activity or if that person is under the age of 14.<sup>147</sup> The only defence<sup>148</sup> for sexual activity with a child under the age of 14 is if the offender can satisfy the following criteria:

- (a) the offender did not know the child was under the age of 14;
- (b) the sex was consensual;
- (c) the act was obviously minor; and
- (d) the act did not cause a serious consequence.

The law does not provide a definition as to what constitutes an “obviously minor” act or a “serious consequence” however in practice the judge will make the determination based on the actual circumstances of each case. Moreover, there is controversy about this defence (which was announced by the Supreme People’s Court) given that some argue it provides an excuse that the offender did not know the child was under the age of 14, and also that it conflicts with the rule that the legal age for consent to sex is 14.

## 5 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?

The punishment for the rape of a child under the age of 14 will be more severe than if the child was over the age of 14 if the circumstances surrounding the two cases are similar (subject to the defence outlined in paragraph 4 above).<sup>149</sup> However, the maximum sentence for the rape of an adult or a child is death. A person who has had sexual relations with a child under the age of 14 is deemed to have committed rape.

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147 PRC Criminal Law, Article 236.

148 This is the reply of the Supreme People’s Court on whether the offence of rape occurs if the offender did not know that the child was under the age of 14 and the sex was consensual.

149 PRC Criminal Law, Article 236.

## 6 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?

Under PRC law, prostitution itself is not a crime, but a prostitute or a client of a prostitute will be subject to punishment according to the PRC Law of Public Security Administration and Punishment. The maximum penalty is 15 days' detention together with a maximum fine of RMB5,000<sup>150</sup> (approximately US\$804).

However, a number of activities related to prostitution are crimes, including organizing, forcing, harboring, inducing or introducing others into prostitution. The maximum punishment for such crimes is death.

Prostitution involving victims under the age of 14 carries a higher penalty in the criminal courts. The charge of forcing children under the age of 14 into prostitution carries a sentence of imprisonment for 10 years or more (up to life imprisonment), in addition to a fine or confiscation of property. If a case is especially serious, the death penalty could be given in addition to confiscation of property.<sup>151</sup> Inducing children under the age of 14 into prostitution carries a sentence of five years or more in prison in addition to a fine.<sup>152</sup>

## 7 Rape of under-age girls and prostitution of under-age girls

Prostitution of under-age girls has been regulated under Article 360 of PRC Criminal Law as an independent crime since 1997. The minimum sentence for the prostitution of under-age girls is five years' imprisonment plus a fine, which is higher than the minimum sentence of three years' imprisonment for rape.

The constitutive elements of the crimes of rape of under-age girls and prostitution of under-age girls are basically the same. However, the objects of the crimes are different. For rape of under-age girls, the object is the ordinary under-age element, whereas for prostitution of under-age girls, the objects generally refer to the under-age engaging in prostitution. In addition, this crime recognizes that under-age children engaging in prostitution have the ability to consent to sex which again conflicts with the rule that the legal age for consent to sex is 14.

There is much controversy over the crime of prostitution of under-age girls. The scholars think that this crime is not effective in respect of protecting the rights of under-age minors, especially for under-age minors engaging in prostitution. Moreover, the maximum sentence for prostitution of under-age girls is 15 years' imprisonment plus

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150 PRC Law of Public Security Administration and Punishment, Articles 66 and 67.

151 PRC Criminal Law, Article 358.

152 PRC Criminal Law, Article 359.

a fine, which is far below the maximum sentence of rape as discussed above. As such, many perpetrators of rape claim that they are guilty of prostitution of an under-age girl instead to avoid a more serious sentence.

In China, rape of under-age girls is occurring with increasing frequency. In order to provide better protection for under-age girls, more and more people advocate that the crime of prostitution of under-age girls shall be abolished and any behavior of sexual relations with under-age girls shall be convicted and punished as rape.

# F SINGAPORE

This section has been prepared by the Singapore office of Drew & Napier LLC.

## 1 Mental suffering as defined by legislation and associated evidentiary requirements

There is no clear definition of the mental suffering of rape victims in Singapore Law or of the evidentiary requirements to prove the same.

The lack of recognition by the law in Singapore, in respect of the mental suffering of rape victims can be gleaned from the law on marital rape exemption. S375(4) of the Penal Code<sup>153</sup> provides that non-consensual penetration by a man of his wife's vagina, using his penis ("marital rape"), will not constitute the offence of "rape" except in limited circumstances.

Further, S376A(5) of the Penal Code provides a "marital rape exemption" whereby a man is free to use his penis to penetrate the vagina of a girl who is under the age of 16, provided they are married to each other. The result of this is that if a woman reports her husband for non-consensual sex in Singapore, he may be charged for "voluntarily causing hurt", or some other less serious crime, carrying a significantly less severe penalty, an exception that in many jurisdictions, would be considered abhorrent.

No evidence purports that marital rape causes any less mental suffering than any other form of rape. Yet the mental suffering of the victim appears to be disregarded by the law. This is probably due to the presupposition of consensual sexual relations in a marriage and the fact that even for minors (marriage between persons below 18 years of age), a couple has to obtain a special marriage licence involving compulsory attendance at marriage preparation courses.<sup>154</sup>

Nonetheless, different women react differently to sexual violence, with some suffering psychological difficulties over a longer term and some recovering sooner.<sup>155</sup> The betrayal of trust can particularly cause distress, coupled with the anxiety of financial dependence on the spouse and the seeming hopelessness of the situation.

The law in Singapore in respect of the mental suffering of rape victims, within marriage, is sadly nonexistent and inadequate for a nation that is considered progressive. In our view, given that psychological effects of rape vary between people, it is unsatisfactory to maintain the marital rape exemption.

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153 Section 375(4) Penal Code Singapore (Cap 224)

154 Sections 9 and 21 of the Women's Charter (Cap 353).

155 "Associations between violence by intimate partners and women's physical and mental health", Chapter 7, WHO Multi-country Study on Women's Health and Domestic Violence, World Health Organisation. 2005.

The Highest Court of Singapore in a fairly recent decision of *Public Prosecutor v UJ*<sup>156</sup> seems to discourage the mitigation of rape offences on account of the victim's forgiveness of the offender. Although such exclusion would be to the detriment of the perpetrator, this may be another indication that the law in Singapore leans towards excluding psychological factors and mental suffering of victims.

In the abovementioned case, the Singapore Court of Appeal discussed the approach of the English Courts, which is to consider the extent of a rape victim's psychological and/or mental suffering caused by the criminal conduct of the perpetrator in deciding the sentence to impose. The Singapore Court of Appeal held that the English position would only apply in exceptional circumstances and only in limited offences. What the Singapore Court of Appeal seemed to advocate was that the Courts should not place an unduly liberal mitigating role to the forgiveness expressed by the rape victim which would affect the sentencing passed by the Court.

This is not to say that mental suffering of rape victims is absolutely disregarded in Singapore. Perhaps as some form of recognition of the impact and mental suffering of rape victims, the process and recognition of dealing with rape in Singapore is slowly changing. The Police now allows non-governmental organisations such as the Association of Women for Action and Research to sit in on police interviews to assist victims of sexual assault by providing emotional support for their mental suffering.<sup>157</sup>

## 2 Compensation regime for rape victims suffering from mental injury

The law in Singapore does not specifically provide for compensation of the mental suffering of rape victims. However, the Court may, in its discretion, order the offender to pay compensation to the victim of the crime in general. This is in accordance with s359 of the Criminal Procedure Code ("**CPC**")<sup>158</sup> :

"359.—(1) The court before which a person is convicted of any offence shall, after the conviction, consider whether or not to make an order for the payment by that person of a sum to be fixed by the court by way of compensation to the person injured, or his representative, in respect of his person, character or property by —

- (a) the offence or offences for which the sentence is passed; and
- (b) any offence that has been taken into consideration for the purposes of sentencing only.

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156 [2008] 4 SLR(R) 500; [2008] SGCA 35

157 Sex victims don't have to go it alone [2012] 28 May Straits Times by Jeremyn Chow

158 Section 359 of the Criminal Procedure Code (Cap 68)

- (2) If the court is of the view that it is appropriate to make such an order referred to in subsection (1), it must do so.”

An example can be found in the case of *ADF v Public Prosecutor and another appeal*<sup>159</sup> where a Compensation Order was made against an offender who sexually and physically abused a domestic worker. No specific reference was made to the mental suffering of the victim.

Section 359 of the CPC<sup>160</sup> makes it mandatory for the Court which convicts an offender to consider whether to order the offender to compensate the victim. Previously, Section 401(1) (b) of the repealed CPC only empowered the court to make a compensation order. The change is intended make the criminal justice process more meaningful to victims of crime.

S10(2) of the Probation of Offenders Act<sup>161</sup> also allows the court discretion to order compensation against the offender:

“10(2) A court, on making a probation order or an order for conditional discharge or on discharging an offender absolutely under this Act, may, without prejudice to its power of awarding costs against him, order the offender to pay such damage for injury or compensation for loss as the court thinks reasonable; but, in the case of an order made by a Magistrate’s Court, the damages and compensation together shall not exceed \$500.”

Note that like the CPC, no specific reference is made to compensation for rape victims.

Despite the above, it is uncommon for Singapore Courts to order compensation to the victims of crimes. This may be due to the lack of guidelines for quantifying the sum of compensation paid to the victim, among other factors.<sup>162</sup>

In some cases, offenders in Singapore voluntarily make compensation payments to the victim. The idea is to demonstrate to the court remorse, genuine good character and reformation.

Victims of rape may also consider making a claim in a civil suit for the mental suffering and anguish caused. (S359(4)) of the CPC:<sup>163</sup>

“(4) Any order for compensation made under subsection (1) shall not affect any right to a civil remedy for the recovery of any property or for the recovery of damages beyond the amount of compensation paid under the order, but any claim by a person or his representative for civil damages in respect of the same injury arising from the offence, shall be deemed to have been satisfied to the extent of the amount paid to him under an order for compensation.”

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159 [2009] SGCA 57 Singapore LAW Reports [2010] SLR

160 Section 359 of the Criminal Procedure Code 2010 (Cap 68)

161 Section 10(2) of the Probation of Offenders Act (Cap 252)

162 Yeo, Stanley “Compensating Victims of crime in Singapore” [1984] 26 MLR 219

163 S359(4) of the Criminal Procedure Code (Cap 68)

Compensation Orders may be issued in cases where the victim sustains physical injuries caused by the offender and is then entitled to claim damages in a civil action. This however, does not appear to make provision for mental suffering. It is not possible to make Compensation Orders in every case, for example, compensation will only be ordered in clear and straightforward cases, and will not be ordered against financially unstable offenders.

In conclusion, there is no specific legislation providing compensation for the mental suffering of rape victims. There are however various ways, as shown above, through which the victim may receive compensation.

The introduction of the CPC took effect on January 2, 2011. Since its introduction there has been an increase in the total number of Compensation Orders from 31 in 2010 to 82 in 2011.<sup>164</sup> Overwhelmingly, 75% were made in relation to cases involving hurt, mischief and theft, this shows a huge discrepancy in the recognition within the law of Singapore, to award compensation to rape victims.

In the Singapore High Court case of *Public Prosecutor v AOB*<sup>165</sup>, the Chief Justice described the power to order compensation as a 'benign and useful power' which should be exercised by the Courts in suitable cases.

Whether this will lead to compensation for the mental suffering of rape victims remains to be seen. However, the Courts now have the power to make such decisions should they feel it appropriate to do so.

Whilst there are signs that the law is changing to recognise the mental anguish of rape victims, it is our view that far more needs to be done in order to make the legal system more fairly balanced. As indicated above the abolishment of the marital rape exemption, should it occur, will go some way to achieving this in Singapore.

### 3 The age of consent and the punishment for engaging in under-age sexual activity

The age at which a person can consent to having sex in Singapore is 16. There are 2 main statutory provisions dealing with underage sex in Singapore, namely "Statutory Penetration of a Minor Under 16" (s376A of the Penal Code) and 'Statutory Rape' (s375 of the Penal Code).

Having sex with a person below 16, with or without her consent amounts to the offence of "Statutory Penetration of a Minor Under 16".

Having sex (penile-vaginal) with a person below 14 with or without her consent will amount to both the offences of "statutory penetration of a minor under 16" and "statutory rape".

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164 <http://www.asiaone.com/News/Latest%2BNews/Singapore/Story/A1Story20120214-327934.html>

165 [2011] 2 SLR 793; [2010] SGHC 376

## Difference between 'statutory penetration of a minor under 16' and 'statutory rape'

"Statutory Penetration of a Minor Under 16" applies to persons below 16 while 'Statutory Rape' only applies to persons below 14. "Statutory Penetration of a Minor Under 16" is also wider and encompasses more scenarios of sexual penetration than rape.

'Statutory Penetration of a Minor under 16' encompasses the following:

- (a) Penetration of a person's penis into another's vagina, anus or mouth, where the victim is under 16 years of age.
- (b) Penetration of a part of the person's body (other than the penis) or anything else, into the vagina, or anus of another person under 16 years of age.
- (c) Causing a man under 16 years of age to penetrate with his penis, the vagina, anus or mouth of another person.
- (d) Causing a person under 16 years of age, to sexually penetrate, with a part of his body, other than his penis, or anything else, the vagina or anus, of any person.

'Statutory Rape' is defined as the penetration of a woman's vagina with the man's penis with or without her consent when she is under 14 years of age.

## Punishment for engaging in underage sex

Where a person commits the crime of 'sexual penetration of a minor under 16', the person shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

Where the minor is below 14 years of age, the offender shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning. As stated above, the offence will also amount to 'Statutory Rape', and the penalties are stiffer, where the offender shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning of not less than 12 strokes. The offence for which the offender is eventually charged lies in the prosecutorial discretion and other circumstances of the case.

## Mistake as to age

Prima facie, in the case of the offence of "Statutory Penetration of a Minor below 16", a reasonable mistake as to the age of a person shall not be a defence.

However, if the offender was below 21 at the time the offence was committed, he may use his mistaken belief as to the age of the minor as a defence.

Note that this defence would not be available if at the time of the offence, the offender had been previously charged in court for similar/related offences<sup>166</sup>.

The defence of 'mistake as to age' does not apply to the offence of 'Statutory Rape'.

## 4 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?

The punishment for the rape of a person below 16 is not, according to statute, more severe than the punishment for rape of an adult. In both cases, a man guilty of the offence of rape shall be imprisoned for a term which may extend to 20 years. The offender shall also be liable to fine or caning.

The difference lies in the case of a victim under 14 years of age, where minimum sentences shall be imposed. This is clearly set out in the table below:

<b>PUNISHMENT FOR RAPE: VICTIM ABOVE 14 YEARS OF AGE</b>	<b>PUNISHMENT FOR RAPE: VICTIM UNDER 14 YEARS OF AGE</b>
a) Imprisonment may extend to 20 years. b) liable to fine and caning.	a) Imprisonment for a term not less than 8 years and not more than 20 years. b) caning with not less than 12 strokes.

## 5 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?

In Singapore, prostitution is regulated or "suppressed". The act of prostitution itself is not an offence. The law punishes activities related to prostitution, for example, solicitation, importing or bringing in women for prostitution, living off immoral earnings and managing a brothel. However, there are unwritten concessions of "licences" provided to brothels that are located in Designated Red-light Areas (**DRAs**).

The act of paying for sex or "commercial sex" is not illegal as long as the sexual services are obtained from a person who is at least 18 years old.<sup>167</sup>

It has been said that the aim of Singapore's legislative policy on prostitution is to keep prostitution out of public sight and to ensure that the prostitution trade is kept at a low

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166 s376A PC, 376B PC, 376C PC, 376E PC, s7 Children and Young Persons Act

167 Sections 376B, 376C, 376D of the Penal Code (Cap 224).

profile. Legislation makes it illegal for prostitutes to persistently solicit in public places and as mentioned, it is technically an offence to manage or assist in the management of a brothel.<sup>168</sup>

However, as stated, there are concessions afforded to persons who manage or carry on the prostitution trade as long as certain conditions are met. These concessions and conditions are part of the unwritten law in Singapore, aimed at minimising public manifestations of prostitution, reducing exploitation of prostitutes and controlling the spread of sexually transmitted diseases.

In Singapore, the specialist police unit called the Anti-Vice Enforcement Unit (AVEU) deals with prostitution. The following informal agreements have developed between the AVEU and those in the prostitution trade which ensure that if any of these agreements are breached, the AVEU can immediately cripple a brothel business by enforcing the written law:

Under certain informal agreements, brothels are allowed to function in designated red-light areas (**DRAs**). It has been reported in 2008 that there are 5 DRAs in Singapore: Geylang, Flanders Square, Keong Siak Street, Desker Road and Orchard Towers.<sup>169</sup>

Brothel owners are expected to ensure that the prostitutes are free from sexually transmitted diseases and the prostitutes are permitted by the AVEU to work in these brothels only if they are “medically registered”. This means that they must have been issued a “yellow card” and have their particulars registered with the AVEU. Prostitutes with “yellow cards” have to go for medical checkups on a fortnightly basis;

The induction of women into brothels is controlled and new prostitutes have to be interviewed by the authorities to ensure that they are working in the brothels out of their own volition;

The brothel operators have to ensure that minors below the age of 18 do not work in their brothels and that the prostitutes working for them are not exploited in any way;

Outside of the DRAs, the prostitution trade can be divided into 3 categories – those who work in semi-permanent brothels, those who are call girls and free-lance prostitutes working on the streets. The AVEU enforces the law against these categories of trade by clamping down / raiding of these semi-permanent brothels, enforcing the law against pimping (pursuant to section 146 of the Women’s Charter, it is illegal to live off the earnings of prostitutes)<sup>170</sup> and enforcing the law against soliciting in public places

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168 Wong J.Y, Brothels, pimps and prostitutes: The administration of justice vis-à-vis prostitution, (1996) 17 Singapore Law Review, 154.

169 TimeOut Singapore Magazine, The best things in life are free (8 March 2008) <<http://www.timeoutsingapore.com/rojak/feature/the-best-things-in-life-are-free>>

170 Section 146 of the Women’s Charter (Cap 353).

pursuant to the Miscellaneous Offences (Public Order and Nuisance) Act. Outside of the DRAs, there are also informal agreements which are aimed at reducing the existence of the prostitution trade as far as possible and driving it within the DRAs.

A summary of the relevant legislation and corresponding punishment relating to prostitution (excluding those involving minors) is as follows:

<b>PROSTITUTION GENERALLY</b>	
S140 of the Women’s Charter relating to selling, buying, procuring, harbouring, receiving, bringing into Singapore any woman or girl for the purposes of prostitution or receiving or harbouring any woman or girl with intent to aid the purpose of procuring the said woman or girl for prostitution	Imprisonment of up to 5 years and fine not exceeding \$10,000 for first timers and additionally, the offending male person who is convicted of a second or subsequent offence shall additionally be liable to caning
S141 & s142 of the Women’s Charter relating to importing and trafficking of women and girls for prostitution	Imprisonment of up to 5 years and fine not exceeding \$10,000
s373A of the Penal Code (Cap 224) relating to importing women for purposes of prostituting	Imprisonment of up to 10 years and fine
S146 of the Women’s Charter relating to persons who knowingly lives on the earnings of the prostitution of another person (i.e. pimping)	Imprisonment of up to 5 years and up to \$10,000 fine
S147 and s148 of the Women’s Charter relating to suppression of brothels and places of assignation <sup>171</sup>	FOR PLACES OF ASSIGNATION AND BROTHELS: Imprisonment of up to 3 years and/or fine of up to \$3000 for first offence and up to 5 years and/or \$10,000 for second or subsequent offences  FOR CLUBS OR PLACE OF PUBLIC RESORT <sup>172</sup> WHICH IS USED AS A PLACE OF ASSIGNATION: Imprisonment of up to 5 years and/or fine of up to \$5000 for first offence and up to 10 years and/or \$15,000 fine for second or subsequent offence

171 “Place of assignation” is defined in s2 of the Women’s Charter as “any place where communication is established with any woman or girl, either directly or through an intermediary, for any immoral purpose.

172 “Club” is defined in s2 of the Women’s Charter as “any place which is used by an association of 2 or more persons for any purpose or object. “Place of public resort” is defined in s2 of the Women’s Charter as “any place to which the public for the time being has access”.

<b>PROSTITUTION GENERALLY</b>	
Section 26 of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184) relating to indecent or disorderly behavior of any common prostitute wandering in any public road or place of public resort	Imprisonment of up to 1 month or up to \$1000 fine
Rules 7 and 8 of the Massage Establishment Rules: For licensed massage establishments, it is an offence for a licensee to permit any person whom he knows or has reason to believe is a prostitute to enter his establishment for massage. It is also an offence for the licensee to employ in his establishment for massage any person whom he knows or has reason to believe is a prostitute	Fine of up to \$1000 and possible revocation of licence
Regulation 24 of the Hotels Licensing Regulations: it is an offence for a licensee to permit any person whom he knows or has reason to believe is a prostitute to occupy a room in the hotel or to frequent the premises.	Fine of up to \$1000 for first offence, and up to \$2000 for subsequent offences. Further, the Court may cancel or suspend any certificate of registration or cancel any licence granted.
Regulation 30 of the Customs (Liquors Licensing) Regulations: It is an offence for a licensee to employ or permit to be employed, any waitress who he knows or has reason to believe is a prostitute	Fine of up to \$5000. Further, the authorities may terminate the waitress' employment.
Part I of Scheduled Conditions of the Public Entertainments and Meetings (Demerit Points) Rules states that for nightclubs, discotheques, bars, cabarets, lounges and other public houses, the licensees shall take all appropriate steps to ensure that offences under the Women's Charter relating to prostitution shall not be committed by staff, patrons or others.	Contravention of any condition of a license shall be liable on conviction to a fine of up to \$10,000 and may be issued with demerit points (six demerit points for contravening a scheduled condition) <sup>173</sup>
Section 8 and 31 of the Immigration Act (Cap 133): Prohibited immigrants may be prohibited from disembarking and may be detained at an immigration depot. Any prostitute or any person who is living on or receiving proceeds of prostitution or who procures or attempts to bring into Singapore prostitutes or women or girls for the purpose of prostitution are "prohibited immigrants"	–

173 Pursuant to Rule 4 of the Public Entertainments and Meetings (Demerit Points) Rules, a licensee may have to provide security of \$2000 if the licensee has been awarded a total number of 12-14 demerit points and an additional \$5000 if the licensee has been awarded a total number of 15, 18 or 21 demerit points. The security provided may also be forfeited if the licensee has been awarded a total number of 15 or more demerit points. Further, a licence can be suspended or cancelled if 21 or more demerit points are awarded.

## 6 Rape of under-age girls and prostitution of under-age girls

### What are the relevant prostitution laws relating to minors?

Targeting those who carry on the trade and/or management of brothels, it is an offence to cause, permit or encourage the prostitution of a girl below the age of 16 or meet/communicate with a person under the age of 16 with the potential of prostitution.<sup>174</sup> The penalties for causing, permitting or encouraging the prostitution of a girl below the age of 16 under the Women's Charter is up to 3 years imprisonment and/or a fine of up to S\$2000. The penalty for meeting/communicating with a person under the age of 16 for the purposes of potential prostitution (or "sexual grooming") is imprisonment of up to 3 years and/or a fine.

On a related note, the trafficking and importation of women and/or girls for the purpose of prostitution carries stiffer penalties with up to 10 years of imprisonment and/or a fine.<sup>175</sup> A similar penalty is meted out for an offence relating to buying and selling of persons under the age of 21 for the purpose of prostitution.<sup>176</sup>

Further, if the authorities have reasonable cause to believe that any woman or girl below the age of 21 years is being trained or used for immoral purposes or lives in or frequents any brothel or is habitually in the company of prostitutes or brothel keepers, the authorities may, by warrant, order the woman or girl to be removed to a place of safety and there temporarily detained until an inquiry has been held.<sup>177</sup> These "places of safety" are usually the local girls' homes or religious service centres.<sup>178</sup>

However, another unwritten law is the understanding that the AVEU will not take any action against prostitutes who are at least 18 years of age. The AVEU acknowledges that by age 18, the girls would be mature enough to make rational decisions for themselves and hence do not need the protection of the law if their decision to enter the prostitution trade is voluntary.<sup>179</sup>

Targeting consumers of the prostitution trade, it is illegal for a person to obtain for consideration (i.e. payment or otherwise), the sexual services of a person who is under 18 years of age. This carries a penalty of up to 7 years imprisonment and/or a fine. It is also an offence for a person to communicate with another person (e.g. a pimp) for the purpose of obtaining for consideration, the sexual services of a person who is under 18 years of age. This carries a penalty of up to 2 years imprisonment and/or a fine.<sup>180</sup>

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174 Sections 143, 145 of the Women's Charter (Cap 353) and Section 376E of the Penal Code (Cap 224).

175 Section 373A of the Penal Code (Cap 224)

176 Section 372, 373 of the Penal Code (Cap 224).

177 Section 159 of the Women's Charter (cap 353).

178 See the Women's Charter (Place of Safety) (No.2) Order 2006, Women's Charter (Place of Safety) Order 2004, Women's Charter (Place of Safety) Order 2006, Women's Charter (Places of Safety)(Consolidation) Order.

179 Wong at p174.

180 Section 376B of the Penal Code (Cap 224).

It is also an offence to intentionally meet, or travel with the intention of meeting a minor under the age of 16 for the purpose of prostitution during or after such meeting. The penalty for this offence is up to 3 years imprisonment and/or a fine.<sup>181</sup>

A summary of the relevant legislation and corresponding punishment involving prostitution and minors is as follows:

S372 and 373 of the Penal Code (Cap 224) relating to selling and buying persons under the age of 21 for the purpose of prostitution	Up to 10 years imprisonment and fine
S143, 145 of the Women’s Charter relating to permitting, causing or encouraging the prostitution of girls below the age of 16	Up to 3 years imprisonment and/or fine of \$2000
S159 of the Women’s Charter relating to the detention (in a place of safety) of any woman or girl below the age of 21 who is being trained or used for immoral purposes or lives in or frequents any brothel	–
Section 376B, 376C of the Penal Code (Cap 224) relating to commercial sex with a minor under 18 (in Singapore or outside of Singapore)	Up to 7 years imprisonment and/or fine And for persons who communicate with another for the purpose of obtaining commercial sex services with a minor under 18 – imprisonment of up to 2 years and/or fine.
Section 376D of the Penal Code (Cap 224) relating to organizing, advertising and/or transporting persons outside of Singapore with the intention of facilitating commercial sex with a minor under 18 in or outside of Singapore	Up to 10 years imprisonment and/or fine
Section 376E of the Penal Code (Cap 224) relating to “Sexual Grooming” or a minor under 16 (i.e. an adult, over 21 years of age, intentionally meeting (or travelling with the intention of meeting) with a minor in or outside of Singapore under the age of 16 for the purposes of prostitution / commercial sex during or after such meeting	Up to 3 years imprisonment and/or fine

181 Section 376E of the Penal Code (Cap 224).

## Difference in punishment for rape and prostitution

In relation to non-minors, the offence of rape in Singapore generally carries a much stiffer penalty than the offences relating to prostitution with a maximum penalty of 20 years imprisonment and fine and/or caning for rape of a victim above 14 years of age.<sup>182</sup> The heaviest penalty for a prostitution related offence is the importation of women and girls for prostitution, where an offender would be liable to 10 years of imprisonment and/or a fine (section 373A of the Penal Code).

To reiterate, it is not an offence to pay for sex with a person who is at least 18 years of age.

In relation to minors, the punishment for rape of a victim under 14 years of age carries a minimum sentence of at least 8 years imprisonment (up to 20 years) and includes caning of a minimum of 12 strokes. "Sexual penetration" of a minor under 16 carries a penalty of imprisonment of up to 10 years and/or a fine.

The penalty for commercial sex with a person under the age of 18 is less harsh, with penalties of up to 7 years imprisonment and/or a fine. However, in light of the Singapore legislation's focus on targeting those who profit from the trade of prostitution, a stiffer penalty of up to 10 years imprisonment and/or a fine is meted out to those who advertise, arrange or transport persons for the purposes of commercial sex with minors (under 18). A similar penalty is meted out for offences relating to the buying and selling of persons under the age of 21 for the purpose of prostitution (s372 and 373 of the Penal Code).

For ease of reference, we set out in the table below a comparison of the punishments meted out to persons who have carnal/sexual relations with another (offences relating to pimps / brothel owners/ those who run businesses related to prostitution are excluded):

<b>PUNISHMENT FOR RAPE: VICTIM UNDER 14 YEARS OF AGE (STATUTORY RAPE)</b>	Minimum sentence of 8 years imprisonment, up to 20 years with caning with minimum 12 strokes
<b>PUNISHMENT FOR "SEXUAL PENETRATION OF A MINOR UNDER 16"</b>	Imprisonment may extend to 10 years And/or fine
<b>COMMERCIAL SEX WITH PERSON UNDER 18</b>	Imprisonment may extend to 7 years And/or fine
<b>PUNISHMENT FOR RAPE: VICTIM OVER 14 YEARS OF AGE</b>	Imprisonment of up to 20 years Fine / Caning
<b>COMMERCIAL SEX WITH PERSON 18 YEARS OR OVER</b>	Legal

182 S375A PC

# G TAIWAN

## 1 Mental suffering as defined by legislation and associated evidentiary requirements

### 1.1 The Crime Victim Protection Scheme

The Crime Victim Protection Act (the “**CVPA**”)<sup>183</sup> was enacted for the purpose of protecting and compensating seriously injured victims of criminal acts, victims of sexual assault crimes and family members of deceased victims.

Article 4 of the CVPA is applicable to victims of sexual assault crimes. The CVPA defines the victims of sexual assault crimes broadly to include victims of rape, attempted rape and other sexual assault under the criminal law, as well as certain victims of child prostitution crimes under the Child and Youth Sexual Transaction Prevention Act (“**CYSTP**”). Pursuant to Article 4 of the CVPA, such victims are entitled to apply for compensation, payable by the state, for their suffering (which includes mental suffering) as a result of the sexual assault crime. The CVPA does not, however, provide a definition of mental suffering, nor does it specify the evidentiary requirements to demonstrate mental suffering.

### 1.2 Civil Claims

Under Article 195 of the Civil Code, if a person has wrongfully damaged the chastity of another, the victim may claim reasonable monetary compensation for their ordeal, whether or not the injury itself is financially quantifiable in nature. The amount of the compensation is determined by a judge, who takes into account the economic conditions of the relevant parties, the pain suffered by the victim and other relevant factors in the specific case.

Under Taiwan law, the elements of a tort claim under the Civil Code are:

- (a) an unlawful act;
- (b) damage suffered by the plaintiff;
- (c) causation; and
- (d) state of mind (intentional or negligent).

Procedurally, civil claims can be brought either independently or ancillary to criminal claims.

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<sup>183</sup> <http://law.moj.gov.tw/LawClass/LawContent.aspx?PCODE=I0050005>.

## 2 Compensation regime for rape victims suffering from mental injury

### 2.1.1 Overview.

As noted above, compensation is payable by the state under the CVPA for mental distress caused to victims of sexual assault crimes. There is also an appeals process in relation to compensation payments awarded under the CVPA.

### 2.1.2 Mitigating Factors with regard to amount of compensation payable.

Under the CVPA, no compensation shall be paid for all or a part of any loss (either mental or physical) suffered under the following circumstances:

- (a) where the cause of harm to the victim is partially attributable to the victim; or
- (b) after taking into consideration the relationship between the victim or their family members and the offender and other relevant factors, it is believed on the basis of general social values that payment of compensation is inappropriate.

The CVPA also provides that if a victim who is applying for compensation under the CVPA has already received any social insurance benefit, damages or other financial benefit under any other regulation for the harm suffered, the sum of such other payments shall be deducted from the amount of compensation payable under the CVPA. Therefore, if the victim has already obtained compensation under a successful civil claim, such amount is to be deducted from the amount of compensation payable to the victim under the CVPA.

## 3 Calculation of Compensation

Pursuant to the CVPA, victims of sexual assault crimes are entitled to the following compensation:

DESCRIPTION OF COST	MAXIMUM AMOUNT
Medical treatment	NT\$400,000 (≈US\$13,821)
Loss/reduction of work ability; increased living expenses of seriously injured victim/victim of a sexual assault	NT\$1,000,000 (≈US\$34,558)
Mental distress	NT\$400,000 (≈US\$13,821)

## 4 The age of consent and the punishment for engaging in under-age sexual activity

The age of consent to sexual intercourse or any other form of sexual activity under the Criminal Code in Taiwan is 16 for both men and women. However, if the victim is under 14, the offender will be subject to a more severe sentence.

Under Article 227 of the Criminal Code, a person who has consensual sexual intercourse with a male or female under the age of 14 shall be sentenced to imprisonment for not less than three years but not more than 10 years whereas a person who has consensual sexual intercourse with a male or female who is over the age of 14 but under the age of 16 shall be sentenced to imprisonment for not more than seven years.

A person who engages in any other form of sexual activity with a male or female who is under the age of 14 shall be sentenced to imprisonment for not less than six months but not more than five years.

A person who engages in any other form of sexual activity with a male or female who is over the age of 14 but under the age of 16 shall be sentenced to imprisonment for not more than three years.

There is no defence of mistaken belief about the age of the victim under the Criminal Code, but there have been instances reported in news articles where the judge dismissed the case when the suspect reasonably believed that the child was over 16. Punishment is reduced or remitted if the offender is under the age of 18.

## 5 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?

Punishment for the rape of a child under 14 is more severe than punishment for the rape of an adult. For the rape of an adult, the offender is subject to imprisonment for at least three years but not more than 10 years.<sup>184</sup> For the rape of a child under 14, the offender is subject to imprisonment of more than seven years.<sup>185</sup>

## 6 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?

Under Taiwan law, prostitution itself is not an offence but a number of related activities may be crimes, such as inducing, accepting or arranging sexual intercourse to make a profit.

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184 Criminal Code, Article 221.

185 Criminal Code, Article 222.

Paying to have sex with under-age children is a crime under Taiwan law. Under the CYSTP, paying to have sex with a child under the age of 16 constitutes statutory rape. If the offender is more than 18 years old, and pays to have sex with a person between 16 and 18 years old, the offender is subject to imprisonment of less than one year, criminal detention or a fine not exceeding NT\$100,000 (approximately US\$3,456).

Under Article 24 of the CYSTP, the punishment for engaging in transactional sex (with a person under the age of 18) by means of violence, menace, use of drugs, control, hypnogenesis or other means against the will of the victim, is imprisonment of more than seven years and a maximum fine of NT\$7,000,000 (approximately US\$241,910). Engaging an under-age person in prostitution against the will of such under-age person may also violate Article 221 and Article 222 the Criminal Code and be determined to constitute rape. Other offences under the CYSTP are activities related to prostitution with children under the age of 18 such as forcing a person to engage in prostitution against his/her will and making a match of, accepting or hiding the victim of involuntary prostitution.

Below is a summary of the different punishments for rape and prostitution-related offences:

ITEM	OFFENCE	PUNISHMENT
1	Rape (of an adult)	3 to 10 years
2	Rape of a child (under 14)	More than 7 years
3	Statutory rape (sexual intercourse with a person under 14)	3 to 10 years
4	Statutory rape (sexual intercourse with a person between 14 and 16)	Less than 7 years
5	Paying to have sex with a person under 16	As set out in item 3 or 4, as applicable
6	Paying to have sex with a person between 14 and 18 against his/her will	More than seven years or as set out in item 1 (whichever is more severe)
7	Paying to have sex with a person under 14 against his/her will	As set out in item 2

## 7 Other Potential Recourse for Rape Victims

Under the Sexual Assault Crime Prevention Act, upon application, the municipality or county government should provide the victim of sexual assault crime with the allowance for medical costs (that are outside the scope of national health insurance and fees for

psychological recovery), legal cost and lawyer’s fees, and other costs. Each municipality or county (city) government should issue implementing details for providing such allowance. According to the Model Principle for Allowance Application by Victims of Sexual Assault issued by the Ministry of Interior, the amounts of such allowances are as follows:

<b>ALLOWANCES</b>	<b>MAXIMUM AMOUNT (NT\$)</b>
Medical Expenses	3,000 (≈US\$104) (after insurance claim)
Psychological Therapy: – Individual consultation – Spouse or family consultation – Group consultation	1,200/hour (≈US\$41), maximum 40 hours/year 1,600/hour (≈US\$55), maximum 24 hours/year 1,600/hour (≈US\$55), maximum 36 hours/year
Attorney’s Fees	50,000/case (≈US\$1,728); 3,000/hour/case (≈US\$104); 8,000/document/case (≈US\$276)
Litigation Expenses	First instance: 20,000/case (≈US\$691) Second/Third instance: 30,000/case (≈US\$1,037)
Emergency Subsidy	Lowest cost of living for that year, maximum: 3 months

# H THE UNITED STATES OF AMERICA

The United States operates under a federal system with two primary jurisdictions of statutory authority, namely the country-wide federal legislature and the fifty state legislatures.

In the United States, rape is generally prosecuted as a crime at the state level. U.S. federal law with respect to sexual abuse crimes applies only in certain limited situations where a crime occurs in certain maritime or territorial jurisdictions of the United States or in a federal prison, or where the act involves crossing state borders.<sup>186</sup>

The principal victim compensation programs for rape victims are found at the state level. It is worth noting, however, that the most significant victim compensation programs at the state level are funded by the federal Crime Victims Fund, which was established by the federal Victims of Crime Act of 1984.<sup>187</sup> Among other things, the Crime Victims Fund provides grants to the various victim services offices at the state level that provide compensation to crime victims (including rape victims) for certain otherwise non-reimbursed, out-of-pocket expenses incurred for medical care or other services reasonably required as a result of the crime, including expenses associated with counselling undertaken in connection with the crime.

In addition, the federal Violence Against Women Act (VAWA), passed in 1994, provided funding and training for the investigation and prosecution of violent crimes against women. VAWA also created the Office of Violence Against Women (OVW) within the U.S. Department of Justice. The OVW's mission is "is to provide federal leadership in developing the nation's capacity to reduce violence against women and administer justice for and strengthen services to victims of domestic violence, dating violence, sexual assault, and stalking."<sup>188</sup> In practice, OVW administers grant programs and provides other assistance to groups throughout the United States that implement, support and develop programs, policies, and practices aligned with its mission. Since it was established in 1995, the OVW has awarded nearly US\$5 billion in grants and cooperative agreements.<sup>189</sup>

The original VAWA also contained a provision that allowed a rape victim to sue her attacker for civil damages in federal court. This provision was struck down as unconstitutional by the U.S. Supreme Court in 2000.<sup>190</sup> A rape victim's rights under state criminal and civil law were unaffected by the decision.

VAWA required reauthorization by year-end 2012, but a final bill to reauthorize VAWA could not be agreed between the U.S. Senate and the U.S. House of Representatives. As a result, VAWA has expired, pending the passage of a new bill by the U.S. Congress.

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186 See, e.g., 18 U.S.C. § 2242.

187 42 U.S.C. Chapter 112.

188 <http://www.ovw.usdoj.gov/overview.htm>

189 <http://www.ovw.usdoj.gov/overview.htm>

190 U.S. v. Morrison, 529 U.S. 598.

In the interim, the OVW will continue to operate so long as the U.S. Congress continues to appropriate funds. Note that the reauthorization approved by the U.S. Senate would have, among other things, increased protection under VAWA to gays, lesbians, bisexuals, transgendered individuals, illegal immigrants and Native Americans.

Similar to the prosecution of rape, the crimes of prostitution and solicitation of prostitution are generally addressed by state law.<sup>191</sup> Federal law, however, addresses sex trafficking across state lines and sex trafficking of children. For example, the U.S. federal Mann Act<sup>192</sup> prohibits the transportation of individuals across state lines for the purpose of engaging in prostitution or other sexual activity for which any person can be charged with a criminal offence, and related crimes. The maximum sentence under the Mann Act is imprisonment of 10 years. Other federal laws relating to sex trafficking include the federal Victims of Trafficking and Violence Prevention Act, which combats trafficking in persons, especially into the sex trade, slavery, and involuntary servitude.

U.S. federal law also specially prohibits the prostitution of children. In particular, a person may not knowingly recruit, entice, harbor, transport, provide, obtain, or maintain a minor (defined as someone under 18 years of age) knowing that the minor would be caused to engage in a commercial sex act.<sup>193</sup> The maximum penalty for violation of these provisions is life imprisonment. The statutory minimum is 15 years in prison if the victim is under the age of 14 or if force, fraud or coercions were used and 10 years if the victim was between 14-17 years old. Any person convicted of obstructing or attempting to obstruct enforcement of this statute is subject to up to 20 years' imprisonment. Defendants convicted under this statute are also required to pay restitution to their victims for any losses they caused.

To illustrate the relevant state laws in this Study we have focused on California, Florida, Illinois, New York and Texas.

## H.1 CALIFORNIA

### 1 Mental suffering as defined by legislation and associated evidentiary requirements

#### 1.1 Compensation for mental suffering through criminal proceedings

The Californian Penal Code does not define the mental suffering of criminal victims, and offers no evidentiary requirements in this regard. Although California has a restitution scheme to help a victim to obtain compensation from the offender, this scheme does not

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191 As with rape, federal law applies to certain limited circumstances. See, for example, 18 U.S.C. § 1384 (prohibiting prostitution or the solicitation or promotion of prostitution near military or naval establishments, punishable by up to one year in prison).

192 18 U.S.C. § 2421.

193 18 U.S.C. § 1591.

cover non-economic losses with only one exception for victims of child molestation.<sup>194</sup> Unless a rape victim happens to be a victim of child molestation, there is no applicable legislation under which he or she can receive compensation for non-economic loss mental suffering through criminal proceedings.

## 1.2 Compensation for mental suffering through civil proceedings

If the victim opts to file a civil claim against the offender, he or she can recover mental suffering under tort proceedings, including battery, assault and IIED. Regardless of which avenue the victim chooses, damages for mental suffering will almost always be capable of recovery. Generally, California case law has recognized mental suffering (mental distress, mental anguish) to constitute an aggravation of damages when it naturally ensues from the act complained of, and include fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal, agony, and physical pain.<sup>195</sup>

In order to succeed in a claim for damages of mental suffering, the victim has to establish the elements of the underlying tort. For rape victims, the most promising theories are battery and IIED. Battery is any intentional, unlawful, and harmful contact by one person with another. To establish a claim for IIED under California Law, the plaintiff must show:

- (a) that defendant's conduct was outrageous;
- (b) that defendant intended to cause or recklessly disregarded probability of causing emotional distress; and
- (c) that plaintiff's severe emotional suffering was actually and proximately caused by defendant's conduct.<sup>196</sup>

The conduct of the defendant must be outrageous, i.e. beyond all bounds of decency; ordinary rude or insulting behavior is not enough to justify an award of damages.<sup>197</sup> In a rape case scenario, the rape itself usually satisfies the outrageous conduct requirement, if proved. The victim has to suffer severe emotional distress. Severe means substantial or enduring as distinguished from trivial or transitory.<sup>198</sup> The outrageous conduct must have been directed at plaintiff and intended to cause plaintiff severe emotional distress,

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194 California Penal Code, Section 1202.4(f)(3)(F).

195 23 Cal. Jur. 3d Damages Sec. 74; *Peralta Community College Dist. v. Fair Employment & Housing Com.*, 52 Cal. 3d 40 (1990); *Capelouto v. Kaiser Foundation Hospitals*, 7 Cal. 3d 889 (1972); *Dryden v. Continental Baking Co.*, 11 Cal. 2d 33 (1938); *Thing v. La Chusa*, 48 Cal. 3d 644 (1989).

196 *Austin v. Terhune*, 367 F.3d 1167 (2004).

197 *Schlauch v. Hartford Acc. & Indem. Co.* 146 CA3d 926 (1983).

198 *Fletcher v. Western Nat'l Life Ins. Co.* 10 CA.3d 376 (1970).

or it must have been performed with “reckless disregard of the probability of causing” such distress.<sup>199</sup> Severe emotional distress means emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it.<sup>200</sup> Finally, the outrageous conduct must have proximately caused the severe emotional distress by the victim.

The standard of proof for both the underlying tort and damages is preponderance of evidence, which means more probable than not. This burden of proof is on the plaintiff.

## 2 Compensation regime for rape victims suffering from mental injury

### 2.1 Introduction

There are two ways for victims of violent crime to receive compensation:

- (a) restitution, which is tied to the criminal proceeding; and
- (b) filing a civil lawsuit.<sup>201</sup>

Victims cannot recover non-economic losses for mental suffering through restitution, but can recover economic losses if related to the mental suffering. With regard to civil lawsuits, damages for mental suffering are generally recoverable.

### 2.2 The restitution scheme

#### 2.2.1 Overview

The Victims’ Bill of Rights Act in the California Constitution provides:

“It is the unequivocal intention of the People of the State of California that all persons who suffer losses as result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.”<sup>202</sup>

“Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.”<sup>203</sup>

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199 Christensen v. Sup.Ct. 54 C.3d 868 (1991).

200 Fletcher v. Western Nat’l Life Ins. Co. 10 CA.3d 376 (1970).

201 There are other ways to be compensated, such as Workers’ Compensation Benefits, insurance, etc., which generally require some actions taken before the harm is made (e.g., buying insurance, enrolled in benefit plan).

202 California Constitution, Sec. 28 (b)(13)(A).

203 California Constitution, Sec. 28 (b)(13)(B).

## 2.2.2 Recoverable losses

The California Penal Code states that in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims.<sup>204</sup> Economic loss has been defined by California Civil Code as "objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities."<sup>205</sup> This restitution scheme is to compensate the past and future economic loss caused by the criminal conduct. The statute specifies 11 types of expenses that are recoverable, including medical expenses, mental counseling expenses, lost wages, attorneys' fees, etc. The statutory list is not exclusive and victims may recover losses that are not on that list, including economic loss caused by psychological injury. The Supreme Court of California<sup>206</sup> ruled the statute does not distinguish between losses caused by physical injury and psychological trauma. However, non-economic loss is generally not recoverable. The only exception to this rule is for child molestation victims who meet the definition stipulated by California Penal Code Section 288,<sup>207</sup> in which case non-economic losses, including psychological harm, are recoverable.<sup>208</sup> Thus, for rape victims, any economic loss as a result of the mental suffering is recoverable, but not damages for the mental suffering itself, unless he or she is also a victim of child molestation. For example, a rape victim will not succeed in an attempt to recover "restitution" for his or her psychological trauma caused by the offender, but he or she will be able to recover expenses for mental counseling, lost earnings due to the psychological trauma. If the rape victim is also a victim of child molestation, then he or she will be able to recover restitution for non-economic damages, including psychological harm. In sum, with one exception for child molestation victims, the damages have to be monetarily measurable in order for the restitution scheme to apply.

## 2.2.3 Procedure

The procedure to secure a restitution order is integrated with the prosecution process. In order to receive restitution, the victim has to affirmatively inform:

- (a) the District Attorney's office in the county where the crime happened;
- (b) Victim Witness Assistance Centers; and/or

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204 California Penal Code, Section 1202.4(f).

205 California Civil Code, Section 1431.2(b)(1).

206 *People v. Brasure* 175 P.3d 32, 2008.

207 California Penal Code, Section 288(a), "any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1 of the Criminal Penal Code, which covers all punishable crimes, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony..."

208 California Penal Code, Section 1202.4(f)(F).

- (c) the Probation Department in the county where the crime happened, regarding his or her losses.

The losses have to be a definite dollar amount in order for restitution to be permitted. The victim is entitled to the full amount of the restitution, even if he or she is covered by insurance. The definite amount is usually decided before defendant's sentencing, and the order is entered into during the sentencing. If the victim cannot decide the full amount before defendant's sentencing, the judge can include a provision that victim compensation will be ordered with the amount "To Be Determined." A restitution hearing will be held thereafter.

It is unnecessary to hold a separate restitution hearing unless:

- (a) the victim cannot decide the exact amount of his/her loss; and/or
- (b) the defendant wishes to contest the requested amount.

If a hearing is held, the burden of proof is on the victim to show that the defendant's criminal conduct substantially caused the victim's losses. The defendant's conduct does not have to be the sole factor causing the losses, so long as the conduct was a substantial factor.<sup>209</sup> The victim must establish the definite amount of compensation is proper by a preponderance of evidence. Evidence such as bills, receipts, medical expenses, profits lost and business records are all admissible at the hearing.<sup>210</sup> The victim can also explain what he or she believes were his or her losses, if no physical evidence can be produced. The defendant has the right to dispute this amount, where the burden of proof shifts to the defendant to provide proper estimates. The court will decide the final amount of the restitution. It is important to note that restitution payments must be recovered from the defendant, and so will only be available if the defendant has assets sufficient to cover any such judgment.

The appeal process for restitution order is the same for criminal cases. The standard of review is abuse of discretion.<sup>211</sup> One way of establishing an abuse of discretion is by showing a demonstrable error of law.<sup>212</sup>

## 2.2.4 California Victim Compensation Program ("CalVCP")

For victims of violent crime (i.e. victims were injured or threatened with injury during the crime) and have direct crime-related expenses that they cannot pay for, they may be eligible for financial assistance through CalVCP even before the offender is sentenced and ordered to pay restitution.<sup>213</sup> CalVCP is the "payer of last resort" and provides financial assistance

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209 Judicial Council of California Criminal Jury Instruction 240 – CALCRIM 240, available at [http://www.courts.ca.gov/partners/documents/calcrim\\_juryins.pdf](http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf).

210 California Penal Code, Section 1203.1d(d).

211 People v. Giordano, 42 Cal.4th 622 (2007).

212 People v. Millard, 175 Cal.App.4th 7 (2009).

213 Financial Recovery: A Victim's Guide to Restitution, by California Department of Corrections and Rehabilitation and California Victim Compensation and Government Claims Board.

only when the victims have no other sources like health insurance or worker's compensation to pay their expenses. For the amount paid by the CalVCP to the victims, the offenders must repay the program. Once they have received financial assistance from CalVCP, the victims are prohibited to receive compensation for the same expenses from the offenders.

## 2.3 Civil law suits and comparison to restitution scheme

The victim's other major option to recover losses is to file a civil law suit. For rape victims, tort theories, such as assault and battery, IIED, as well as negligence, usually form the basis of the actions. The victims have to hire their own lawyers to file claims with the proper courts. Generally, the civil law suit will last much longer than the process for a restitution order, which is tied into the related criminal proceeding. Also, victims who choose to file their own civil lawsuits have to pay legal fees; this is not the case for restitution since prosecutors do not collect fees. The major benefit for the victims with regard to filing a civil lawsuit is that the recoverable damages are not limited to economic losses. Damages for pain and suffering, including mental suffering, are generally recoverable, subject to evidence.

## 3 Calculation of compensation

Since the restitution system is designed to compensate the victim's actual losses, the compensation for each victim is generally based on the actual economic loss and some permissible future losses. The court order establishing the restitution amount has to be based on the evidence established by the victim. Thus it is important for the victims to keep records (e.g. medical bills, receipts, etc.) of expenses related to the crime. The defendant has the right to a hearing to dispute the determination of the amount of restitution. Once the amount has been established, the court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.<sup>214</sup> Therefore, the calculation of compensation is decided on a case-by-case manner based on evidence of losses the victim suffered.

## 4 The age of consent and the punishment for engaging in under-age sexual activity

The age of consent to sexual intercourse is 18 years. As defined by California Penal Code, a minor is a person under the age of 18 years, and an adult is a person who is at least

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<sup>214</sup> California Penal Code, Section 1202.4(f).

18 years of age. Sexual intercourse with a minor who is not the spouse of the offender is unlawful sexual intercourse (statutory rape).<sup>215</sup> If the minor is no more than three years older or three years younger than the offender, the offender is guilty of a misdemeanor.<sup>216</sup> If the offender is more than three years older than the minor victim, he or she will be guilty of either a misdemeanor or a felony, punishable by imprisonment up to three years.<sup>217</sup> If the offender is 21 years of age or older and the victim is under 16 years of age, the offender will be guilty of either a misdemeanor or a felony, punished by imprisonment of up to four years.<sup>218</sup> An adult offender may also be subject to civil penalties (fines).<sup>219</sup>

Mistake of victim's age is a defence for statutory rape, under the current rule established by the Supreme Court of California in *People v. Hernandez*.<sup>220</sup>

## 5 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?

The punishment for rape of an under-age victim is not automatically more severe than punishment for rape of an adult. In California, the punishments for rape of either an adult or a minor include:

- (a) formal probation;<sup>221</sup>
- (b) up to eight years in the state prison;<sup>222</sup>
- (c) a possible additional five years in the state prison if the victim sustains a significant or substantial physical injury;<sup>223</sup>
- (d) a maximum fine of US\$10,000;<sup>224</sup>
- (e) registration as a sex offender under California Penal Code 290,<sup>225</sup> and
- (f) a possible "strike" on your record in accordance with Californian Three Strike's Law.<sup>226</sup>

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215 California Penal Code, Section 261.5(a).

216 California Penal Code, Section 261.5(b); a misdemeanor is any criminal offence with a maximum punishment of less than one year of imprisonment.

217 California Penal Code, Section 261.5(c).

218 California Penal Code, Section 261.5(d).

219 California Penal Code, Section 261.5(e).

220 *People v. Hernandez*, 61 Cal.2d 529 (1964).

221 California Penal Code, Section 1203.

222 California Penal Code, Section 264

223 California Penal Code, Section 12022.7.

224 California Penal Code, Section 672.

225 California Penal Code, Section, 290.

226 California Penal Code, Section 1192.7.

The punishment for rape applies regardless of whether the victim is an adult or a minor. Punishment is measured on a case-by-case basis, depending on the underlying facts. The victim's age is one of the factors the judges take into consideration for sentencing. For cases involving under-age victims, both the rape law and the statutory rape law will apply. If one defendant is convicted both for rape and statutory rape, the defendant may be punished more severely than another defendant in a similar case involving an adult victim, if the judge decides to run the punishment consecutively instead of concurrently.

## 6 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?

Prostitution is a crime in California. Under California Penal Code Section 647(b), it is a misdemeanor for a person "who solicits or who agrees to engage in or who engages in any act of prostitution." Prostitution means engaging in sexual intercourse or any lewd act with another person in exchange for money or other consideration. Specific intent is required for a conviction for prostitution.

The punishment for prostitution is significantly less severe than that for rape. The punishment for prostitution may include:

- (a) a minimum of 45 days to one year in county jail;<sup>227</sup>
- (b) 90 days to one year in county jail if the defendant is convicted of a third prostitution or solicitation offence; and<sup>228</sup>
- (c) suspension of the defendant's driver's license for up to 30 days or issuance of a restricted license for up to six months, if the defendant committed the offence while using a car and within 1,000 feet of a residence.<sup>229</sup>

In prostitution cases involving an under-age minor (18 years or below), the statutory rape law will apply and separate charges may be made. However, there is no separate law applying in prostitution cases involving under-age persons.

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227 California Penal Code, Section 647(k).

228 California Penal Code, Section 647(k).

229 California Penal Code, Section 647(k); see also California Penal Code, Section 13201.5.

## H.2 FLORIDA

### 1 Mental suffering as defined by legislation and associated evidentiary requirements

#### 1.1 Compensation for mental suffering in connection with criminal proceedings

There is no Florida legislation that specifically defines mental suffering for criminal victims, including rape victims.

#### 1.2 Compensation for mental suffering through civil proceedings

Rape victims are able to recover damages for mental suffering through civil proceedings. Civil suits of this type are typically brought under tort theories such as assault, battery, and IIED. A civil suit is usually filed after the criminal trial concludes, and must be filed before the statute of limitations has run.

Under Florida law, a plaintiff must prove four elements to succeed in a claim for IIED:

- (a) the wrongdoer's conduct was intentional or reckless;
- (b) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;
- (c) the conduct caused emotional distress; and
- (d) the emotional distress was severe.<sup>230</sup>

Only conduct, which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," meets the standard necessary to succeed in a claim for IIED.<sup>231</sup> It is not enough that the intent is tortuous or criminal; it is not enough that the defendant intended to inflict emotional distress; and it is not enough that the conduct was characterized by malice or aggravation."<sup>232</sup> Whether conduct is extreme and outrageous is evaluated by an objective standard based on all of the facts and circumstances. A complaint that seeks recovery for IIED must allege some facts that, if

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230 *Johnson v. State Dept. of Health and Rehab. Svc's*, 695 So.2d 927 (Fla. 2d DCA 1997), quoting *Dominguez v. Equitable Life Assurance Soc'y*, 438 So.2d 58, 59 (Fla. 3d DCA 1983).

231 *Clemente v. Horne*, 707 So.2d 865, 867 (Fla. 3d DCA 1998), citing Restatement (Second) of Torts, § 46 cmt. D (1965).

232 *Ibid*, citing *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So.2d 1210, 1213 (Fla. 5th DCA 1995).

true, would support the conclusion that the emotional distress is a proximate result of the defendant's severe conduct. Claims based solely on allegations of verbal abuse are generally legally insufficient.<sup>233</sup> Merely characterizing emotional distress as severe is not sufficient. This burden of proof is on the plaintiff.

## 2 Compensation regime for rape victims suffering from mental injury

### 2.1 Introduction

There are two principal ways to obtain compensation for mental suffering of rape victims:

- (a) civil litigation, which allows the victims to receive compensation for non-economic losses; and
- (b) the statutory Bureau of Victim Compensation scheme (a legislative crime victim's compensation scheme administered by the Florida Attorney General's Office).

### 2.2 Civil lawsuits

The civil suit is generally filed after the criminal trial concludes and must be filed before the statute of limitations has run. However, there is no requirement that the criminal trial found guilty, or even that there was a criminal trial, in order to bring a civil claim.

Civil suits are private lawsuits, so the victim will need to initiate the action. One benefit of a civil lawsuit is that the victim has more control over the case than in a criminal proceeding and may confront the perpetrator by choice. A disadvantage is that the victim may have to spend a large amount of money and time to prosecute the case. Damages for mental suffering can be fully recoverable in civil lawsuits.

Plaintiffs in rape cases who choose to file a civil lawsuit may assert a variety of potential causes of action. The most common claims for damages ensuing from rape are assault, battery and IIED.<sup>234</sup> While the standard of proof in most civil cases required in a criminal trial is "beyond a reasonable doubt,"<sup>235</sup> the standard is "by a preponderance of the evidence", which is a much lower standard of proof. The difference in the standards of proof gives the plaintiff an advantage in civil proceedings, and may lead to a civil suit

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233 *De La Campa v. Grifols America Inc.*, 819 so.2d 940 (Fla. 3d DCA 2002) citing *Ponton v. Scarfone*, 468 So.2d 1009 (Fla. 2d DCA 1985).

234 Ellen M. Bublick: "Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies," *SMU Law Review*, 2006.

235 *In re Winship*, 397 U.S. 358 (1970).

that succeeds even where a related criminal trial did not result in a conviction. Victims may sue the assailant, third parties, or both, and may recover compensatory damages for physical injuries, medical expenses, lost wages, and mental distress.

## 2.3 Crime Victim's Compensation

Chapter 960 of the Florida Statutes establishes a victim of crime compensation fund which is administered by the Office of Attorney General's Bureau of Victim Compensation. A claim may be brought by a rape victim or his/her representative, or (where the victim is deceased) his/her surviving spouse, children or other dependents.<sup>236</sup> Only an 'innocent victim' can bring a claim under the statutory regime<sup>237</sup> – in particular, victims who were engaged in an unlawful activity (including prostitution) at the time of the crime upon which the claim for compensation is based are not eligible for an award.<sup>238</sup>

An award will not be made under the statutory regime unless the following conditions can be satisfied:

- (a) a crime was committed;
- (b) such crime directly resulted in personal injury to, psychiatric or psychological injury to, or death of, the victim or intervener; and
- (c) such crime was promptly reported to the proper authorities (generally within 72 hours of the crime) and the claimant has cooperated with the state attorney and all law enforcement agencies.<sup>239</sup>

The Bureau of Victim Compensation looks to actual loss suffered by the victim, and accordingly there is no compensation for mental suffering in its own right. However, victims are able to bring a claim for expenses incurred by the victim (or a member of his/her family) in connection with grief counseling services, psychiatric counseling and other mental health services which have been sought by the victim or his/her family to treat such mental suffering.

## 3 Calculation of compensation

### 3.1 Civil lawsuits

Victims can receive compensation for "economic loss" that includes all pecuniary harm for which damages are recoverable through civil proceedings. Victims can also receive

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236 Florida Statutes (2007), § 960.065.

237 Florida Statutes (2007), § 960.065(2)-(3).

238 Florida Statutes (2007), § 960.065(2)(b).

239 Florida Statutes (2007), § 960.13.

compensation for “non-economic loss,” which includes loss of consortium and all non-pecuniary harm for which damages are recoverable such as damages for pain and suffering, inconvenience, disfigurement, and physical impairment, through civil proceedings.

## 3.2 Crime Victim’s Compensation

Because the Bureau of Victim Compensation scheme is a secondary compensation scheme, recovery may only be obtained for out-of-pocket losses (e.g. the cost of counseling/psychiatric treatment relating to mental suffering, but not the mental suffering itself). However, even if all of the conditions described in paragraph 2.3 have been established, there is a discretionary ‘actual need’<sup>240</sup> test which must also be satisfied; this means that the Bureau of Victim Compensation will not make any payment:

- (a) unless all other sources of benefits available to the victim (including from other statutory schemes, insurances or the perpetrator of the crime) have been exhausted; and
- (b) if the victim will not suffer serious financial hardship as a result of the loss of earnings or support or the out-of-pocket loss incurred as a result of the crime.

If an award is made, it will be subject to the following limitations/caps:

- (i) US\$10,000 for treatment;
- (ii) US\$10,000 for continuing or periodic mental health care of a minor victim whose normal emotional development is adversely affected by being the victim of a crime;
- (iii) a total of US\$25,000 for all compensable costs; or
- (iv) US\$50,000 when the department makes a written finding that the victim has suffered a catastrophic injury as a direct result of the crime.<sup>241</sup>

## 4 The age of consent and the punishment for engaging in under-age sexual activity

A child under 16 years of age cannot consent to sexual activity, regardless of the age of the other person.<sup>242</sup> A child who is at least 16 years of age but younger than 18 years of

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240 Florida Statutes (2007), § 960.13(2)-(8).

241 Florida Statutes (2007), § 960.13(9)(a).

242 Florida Statutes (2007), § 794.04.

age is able to consent to sexual activity provided that the child’s sexual partner is under 24 years of age.<sup>243</sup> There is no defence for mistake of age.

The following table summarizes the punishments for engaging in under-age sex:

FLORIDA STATUTE	VICTIM’S AGE	OFFENDER’S AGE	PUNISHMENT
794.011(2)(a)	Less than 12 years	18 years or more	Capital Punishment
794.011(2)(b)	Less than 12 years	Less than 18 years	Life in prison
800.04(4)	12 years or older but less than 16 years	Any age	7.5-15 years in prison
794.05 L6	16 or 17 years	24 years or older	5-15 years

Every person convicted of a sexually-related felony offense in Florida is declared a sexual offender and is forced to comply with sexual offender registration laws throughout the state and the United States. This restricts where the offender can live, imposes a curfew, requires mandatory sex offender counseling, and restricts where the offender can work. Sex offenders must update their residence with every three to six months for their entire life.

## 5 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?

The Florida Statutes include a number of specific offences relating to sexual offences against minors. These offences carry more severe punishments than similar offences where the victim is an adult. For example if a person over 18 years of age is convicted of sexually battering (raping) a victim under 12 years of age the penalty is death.<sup>244</sup> A conviction for the same offence, but where the victim was over 18 years of age, would result in as little as two years and no more than life in prison (various factors, including criminal history of the offender, any position of authority, use of weapon (and so forth) account for the large range in terms of imprisonment).

243 Florida Statutes (2007), § 794.05.

244 Florida Statutes (2012), § 794.011(2)(a).

## 6 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?

Under Florida law, it is unlawful to participate in prostitution, to arrange prostitution and/or to solicit or purchase prostitution services. State law also criminalizes the operation of a service offering prostitution and the availability of a building or other premises for prostitution. In addition, Florida prohibits procurement, also known as pandering and more commonly known as “pimping”, during which an individual persuades or hires another person to engage in prostitution, or offers prostitution services performed by another person. Florida laws define prostitution as the “giving or receiving of the body for sexual activity for hire.” The state describes “sexual activity” as a wide range of sexual activities. Florida sets criminal charges for a number of offences related to prostitution.<sup>245</sup>

Florida state laws increase the penalties for prostitution offences when the defendant has prior convictions for prostitution. A first offence may be charged as a second degree misdemeanor, which can result in a term of imprisonment for up to 60 days, a fine in an amount up to US\$500, or both. The state charges a second offence as a first degree misdemeanor, which can result in a term of imprisonment for up to one year, a fine in an amount up to US\$1,000, or both.

A third offence or any following offence can result in a third degree felony charge. Under Florida law, the potential term of imprisonment may go up to five years and the fine may increase to US\$5,000. State law also allows the option of pre-trial admission to a substance abuse treatment or intervention program.

If the offence involves the procurement of a person who is under 18 years of age, the charge increases to a second degree felony, which can result in up to 15 years of imprisonment, a fine of up to US\$10,000, or both.

### H.3 ILLINOIS

#### 1 Mental suffering as defined by legislation and associated evidentiary requirements

##### 1.1 Compensation for mental suffering through criminal proceedings

There is no Illinois legislation that specifically defines mental suffering for criminal victims, including rape victims.

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245 Florida Statutes (2010) (including Special Session A), § 796.03-796.09.

## 1.2 Compensation for mental suffering through civil proceedings

Rape victims are able to recover damages for mental suffering through civil proceedings. Civil suits of this type are typically brought under tort theories such as assault, battery, and IIED. A civil suit is usually filed after the criminal trial concludes, and must be filed before the statute of limitations has run.<sup>246</sup> Unlike criminal proceedings which are governed by both statutes and case law, civil proceedings sounding in tort are governed by case law.

Under Illinois law, a plaintiff must prove three elements to succeed in a claim for IIED:

- (a) the defendant's conduct was extreme and outrageous;
- (b) the defendant intended that his conduct inflict severe emotional distress, or knew that there was at least a high probability that his conduct would cause severe emotional distress; and
- (c) the conduct actually caused severe emotional distress.<sup>247</sup>

The tort does not arise from mere threats, insults, indignities, annoyances, or petty oppressions, but requires coercion, abuse of power or authority, and harassment.<sup>248</sup> The infliction of such emotional distress such as fright, horror, grief, shame, humiliation, and worry is not sufficient to give rise to a cause of action.<sup>249</sup> To support a claim for IIED, defendant's conduct must be so extreme as to go beyond all bounds of decency, and be regarded as intolerable in a civilized community.<sup>250</sup> Whether conduct is extreme and outrageous is evaluated by an objective standard based on all of the facts and circumstances. Emotional distress constitutes legally cognizable damage only where the distress is particularly severe. Illinois courts require medically verifiable manifestations of severe emotional distress.<sup>251</sup> A claim that seeks recovery for IIED must allege some facts that, if true, would support the conclusion that the severe emotional distress is a proximate result of the defendant's conduct. Merely characterizing emotional distress as severe is not sufficient.<sup>252</sup> This burden of proof is on the plaintiff and the fact finder could be a jury or a judge, depending on the parties' selection.

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246 Florida Statutes (2010) (including Special Session A), § 796.03-796.09.

247 Whitley v. Taylor Bean & Whitacker Mortg. Corp., 607 F. Supp. 2d 885 (N.D. Ill. 2009).

248 McGrath v. Fahey, 126 Ill. 2d 787 (1988); Brackett v. Galesburg Clinic Ass'n, 293 Ill. App. 3d 867 (3d Dist. 1997).

249 Adams v. Sussman & Hertzberg, Ltd., 292 Ill. App. 3d 30 (1st Dist. 1997).

250 Hardaway v. CIT Group/Consumer Finance Inc., 836 F. Supp. 2d 677 (N.D. Ill. 2011).

251 183 Ill. 2d 407 (1998).

252 735 ILCS 5/2-612(b); Welsh v. Commonwealth Edison Co., 306 Ill. App. 3d 148 (1st Dist. 1999).

## 2 Compensation regime for rape victims suffering mental distress

### 2.1 Introduction

There are several ways to obtain some form of compensation for mental suffering of rape victims. Two main legal methods are:

- (a) restitution, which is part of the criminal prosecution process; and
- (b) civil litigation, which allows the victims to receive compensation for non-economic losses.

Other ways to obtain compensation includes insurance, workers' compensation, or Crime Victim's Compensation Act.

### 2.2 The restitution scheme

The Rights of Crime Victims and Witnesses Act<sup>253</sup> establishes the restitution scheme.<sup>254</sup> Under the restitution scheme, victims can only receive compensation for "out-of-pocket" losses. Non-economic loss can be recovered through civil proceedings.

The court must order restitution pursuant to the provisions of 730 ILCS 5/5-5-6 in all convictions for offences in violation of the Illinois Criminal Code of 1961 in which the person received any injury to their person or damage to their real or personal property as a result of the criminal act of the defendant.<sup>255</sup> According to the restitution provision of the Unified Code of Corrections, only economic losses are recoverable. For sexual assault cases, the amount of restitution is equal to actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim, and restitution would be paid in cash. The statute specifically prohibits restitution "to be paid on account of pain and suffering," which includes mental suffering.<sup>256</sup> For domestic battery cases, which may be accompanied by rape, restitution should also include housing and service fees charged by any domestic violence shelters in which the victim and any other family or household members lived.<sup>257</sup> Future expenses related to the effects of the crime, including

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253 725 ILCS 120/2: "The purpose of this Act is to implement, preserve and protect the rights guaranteed to crime victims by Article I, Section 8.1 of the Illinois Constitution to ensure that crime victims are treated with fairness and respect for their dignity and privacy throughout the criminal justice system and to increase the effectiveness of the criminal justice system by affording certain basic rights and considerations to the witnesses of violent crime who are essential to prosecution."

254 725 Ill. Comp. Stat. 120/1 (2008).

255 730 ILCS 5/5-5-6. *People v. Oshana*, 965 N.E.2d 1174 (Ill. App. Ct. 2d Dist. 2012).

256 730 ILCS 5-5-6 (b).

257 730 ILCS 5/5-5-6 (b).

expenses for mental health care are recoverable as restitution.<sup>258</sup> In a sexual abuse offence, this may also include expenses for future mental counseling.<sup>259</sup>

A valid order generally must contain a maximum dollar limit; a time frame for counseling and proof of expenses incurred; monitoring and administering of the restitution by court services; a provision that in the event of a dispute, either party may petition the court for resolution thereof; and when bond money is being used for restitution, a date when any bond monies not used will be returned to the defendant.<sup>260</sup> However, there are cases awarding restitution without well-documented expenses. In *People v. Morgan*, a child sex abuse victim's father spent more than US\$3,000 on psychological counseling for the victim but did not provide court ordered documentation of those expenses; nonetheless, the father recovered those expenses as restitution.<sup>261</sup>

In order to receive court ordered restitution, the victim must inform the Police Department or the State's Attorney's Office that he or she wishes to receive restitution and provide estimates of actual out-of-pocket expenses, losses, damages, and injuries prior to the case's completion. Restitution is not always a matter of absolute right,<sup>262</sup> and a restitution order can be reversed on appeal. Restitution payments must be recovered from the defendant, and so will only be available if the defendant has assets sufficient to cover any such judgment.

## 2.3 Crime Victim's Compensation Act

In October, 1973, the State of Illinois enacted legislation to provide monetary assistance to victims of violent crime. This legislation is known as the Illinois Crime Victim's Compensation Act.<sup>263</sup> Its purpose is to help reduce the financial burden often imposed upon innocent persons by violent crimes and to encourage cooperation with law enforcement agencies.

The compensation program acts as a secondary source of recovery.<sup>264</sup> When victims incur expenses as a result of a crime, they must try to recover those expenses from other

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258 730 ILCS 5/5-5-6 (f-1)(1), "[i]n addition to any other penalty prescribed by law and any restitution ordered under this Section that did not include long-term physical health care costs, the court may, upon conviction of any misdemeanor or felony, order a defendant to pay restitution to a victim in accordance with the provisions of this subsection (f-1) if the victim has suffered physical injury as a result of the offence that is reasonably probable to require or has required long-term physical health care for more than 3 months. As used in this subsection (f-1) "long-term physical health care" includes mental health care."

259 *People v. Cole*, 193 Ill. App. 3d 990 (1990).

260 *People v. Benson*, 251 Ill. App. 3d 144 (1993).

261 *People v. Morgan*, 259 Ill. App. 3d 77 (1994).

262 *Calumet and Chicago Canal & Dock Co. v. Davis*, 218 Ill. App. 176 (1st Dist. 1920).

263 740 ILCS 45.

264 740 ILCS 45/10.1(g): "Compensation under this Act is a secondary source of compensation and the applicant must show that he or she has exhausted the benefits reasonably available under the Criminal Victims' Escrow Account Act<sup>1</sup> or any governmental or medical or health insurance programs, including but not limited to Workers' Compensation, the Federal Medicare program, the State Public Aid program, Social Security Administration burial benefits, Veterans Administration burial benefits, and life, health, accident or liability insurance."

sources, such as restitution, insurance or public aid. After they have exhausted all other sources, they then may be eligible for assistance from this program.

The administration of the Crime Victims Compensation Act is carried out by the Illinois Attorney General's Office and the Illinois Court of Claims. An investigatory report is submitted by the Attorney General's Office to the Court of Claims outlining the merits of each claim. The final decision is then made by the Court of Claims.<sup>265</sup> In order to qualify for compensation under the program, the victim must file his or her application within one year from the date of the crime; the crime must have been reported to law enforcement authorities within 72 hours of occurrence;<sup>266</sup> there must be full cooperation with law enforcement officials;<sup>267</sup> and the injury or death of the victim cannot have been attributed to the wrongful conduct or provocation by the victim.<sup>268</sup>

## 2.4 Civil lawsuits

The civil suit is generally filed after the criminal trial concludes and must be filed before the statute of limitations has run. Civil suits are private lawsuits, so the victims need to initiate the actions. The benefits of a civil lawsuit are that victims have more control over the case and may confront the perpetrator by choice.<sup>269</sup> Damages for mental suffering are fully recoverable in civil lawsuits. The disadvantage is that victims may have to spend a large amount of money and time to prosecute the case.

Plaintiffs in rape cases who choose to file a civil lawsuit may assert a variety of potential causes of action. The most common claims for damages ensuing from rape are assault, battery and IIED.<sup>270</sup> While the standard of proof required in a criminal trial is "beyond a reasonable doubt,"<sup>271</sup> the standard is "by a preponderance of the evidence" in most civil cases, which is a much lower standard of proof. The difference in the standards of proof gives the plaintiff an advantage in civil proceedings. Victims may sue the assailant, third parties, or both, and may recover compensatory damages for physical injuries, medical expenses, lost wages, and mental distress.

## 2.5 Workers' Compensation

Workers' compensation is a no-fault system of benefits paid by employers to workers who experience job-related injuries or diseases.<sup>272</sup> This type of third-party liability for

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265 740 ILCS 45/4.1.

266 740 ILCS 45/6.1(b).

267 740 ILCS 45/6.1(c).

268 740 ILCS 45/6.1(e).

269 U.S. Department of Justice: "A Survivor's Guide to Filing a Civil Law Suit" (2004).

270 Ellen M. Bublick, "Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies" (2006) 59 SMU Law Review 55.

271 *In re Winship*, 397 U.S. 358 (1970).

272 820 ILCS 305/1.

sexual assault arises where the assault was caused or encouraged by an employer's failure to protect against a known and identifiable risk of such harm. Victims who are exposed to a greater risk of sexual assault than the general public during their employment may succeed in a workers' compensation claim for disability resulting from injuries, whether physical or psychological, caused by the assault.<sup>273</sup>

### 3 Calculation of compensation

Victims can receive compensation for "economic loss" that includes all pecuniary harm for which damages are recoverable, through either the restitution process or civil proceedings.<sup>274</sup> Victims can also receive compensation for "non-economic loss," which includes loss of consortium and all non-pecuniary harm for which damages are recoverable such as damages for pain and suffering, inconvenience, disfigurement, and physical impairment, through civil proceedings.<sup>275</sup> In 1997, the Illinois Supreme Court declared the previous cap on compensatory damages for non-economic injuries unconstitutional.<sup>276</sup>

For purposes of calculating restitution, the loss to the victim is the value of that which was obtained from the victim as a result of the criminal conduct.<sup>277</sup> The amount of restitution should not exceed the actual out-of-pocket expenses or loss to the victim proximately caused by the defendant's conduct.<sup>278</sup> The purpose of restitution is to compensate crime victims for all the injuries they suffered at the hands of the defendant and to make the defendant pay all the costs of his crime. In setting the amount of restitution, the trial court should focus on the victim and attempt to spare him or her the additional expense, stress and delay of a civil suit.<sup>279</sup> Under current case law, since future losses are included for restitution, the amount of restitution can be very large in some cases.

Because the Crime Victims Compensation Act is a secondary compensation scheme, recovery may only be obtained for out-of-pocket losses, which do not include damages for mental suffering, and cannot exceed US\$27,000 for any claim.<sup>280</sup>

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273 *Rush-Presbyterian - St. Luke's Medical Center v. Industrial Comm.*, 258 Ill. App. 3d 768 (1st Dist. 1994).

274 735 ILCS 5/2-1702.

275 735 ILCS 5/2-1702.

276 *Best v. Taylor Mach. Works*, 179 Ill.2d 367 (1997).

277 *People v. Behm*, 154 Ill. App. 3d 987 (5th Dist. 1987).

278 730 ILCS 5/5-5-6.

279 *People v. McGruder*, 307 Ill. App. 3d 970 (3d Dist. 1999).

280 740 ILCS 45/10.1 (f); 740 ILCS 45/17 (c): "The Court of Claims may consider the nature and extent of the injury, economic loss, settlements, hospital costs, physician costs, attorney's fees and costs, and all other appropriate costs."

## 4 The age of consent and the punishment for engaging in under-age sexual activity

The age of consent to sexual activity in Illinois is 17.<sup>281</sup> The law has been used to prosecute mutually agreed sexual activity between two young people of similar age. For example, when a person commits an act of sexual conduct with someone age 13 to 16 and the person is less than five years older than the minor, that person is guilty of criminal sexual abuse, even if both participants believed the sex was consensual.<sup>282</sup> Additionally, when a person under the age of 17 commits an act of sexual conduct with another who is also under the age of 17, but at least nine years old, they are both guilty of criminal sexual abuse.<sup>283</sup>

A person is guilty of criminal sexual abuse who:

- (a) commits an act of sexual conduct or sexual penetration with a minor who is 13 to 16 years of age and the person is less than five years older than the minor; or
- (b) engages in sexual conduct with a minor who is between nine and 16 years of age and the person is under 17 years of age, where no force or threat of force is used and there is no knowledge by the person that the minor is unable to understand the nature of the act or is unable to give knowing consent.

Criminal sexual abuse in this context is punishable by up to one year of imprisonment, and offenders are required to register with the state's sex offender registry, discussed in greater detail below.<sup>284</sup>

There is a defence of mistaken belief about the age of a child in the following contexts:

- (c) if the child is nine to 16 years of age and the perpetrator is under 17 years of age; or
- (d) if the child is 13 to 16 years of age.<sup>285</sup>

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281 Illinois law differentiates between "sexual conduct" and "sexual penetration":

"Sexual conduct means any knowing touching or fondling by the victim of the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1.

"Sexual penetration means any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person." *Id.*

282 720 ILCS 5/11-1.50(c).

283 720 ILCS 5/11-1.50(b); *In re T.W.*, 291 Ill. App. 3d 955, 960 (5th Div. 1997) (When "two minors engage in a consensual sexual act, the statute may validly be applied to prosecute both minors on the basis that each is the victim of the other.").

284 720 ILCS 5/11-1.50; 730 ILCS 5/5-4.5-55(a).

285 720 ILCS 5/11-1.70(b).

## 5 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?

Under Illinois law, a person who commits an act of sexual penetration and:

- (a) uses force or threat of force;
- (b) knows that the victim is unable to understand the nature of the act or is unable to give knowing consent;
- (c) is a family member of the victim and the victim is under 18 years of age; or
- (d) is at least 17 years of age and holds a position of trust, authority, or supervision in relation to the victim who is 13 to 17 years of age,

would be guilty of criminal sexual assault and subject to imprisonment of four to 15 years.<sup>286</sup>

If a person is under 17 years of age and:

- (a) commits an act of sexual penetration with a victim under nine years of age; or
- (b) commits an act of sexual penetration with a victim who is nine to 12 years of age while using force or threat of force to commit the act,

that person is guilty of aggravated criminal sexual assault, which is punishable by imprisonment of six to 30 years.<sup>287</sup>

If a person is 17 years of age or older and commits an act of sexual penetration with a victim under 13 years of age, that person is guilty of predatory criminal sexual assault of a child, which is punishable by six to 60 years imprisonment.<sup>288</sup> There are additional sentencing guidelines for rape committed under aggravating circumstances, such as being armed with a firearm, using a firearm, causing great bodily harm to the victim, or delivering a controlled substance to the victim without the victim's consent.

In addition to incarceration, a person who is charged with criminal sexual abuse, criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, or aggravated criminal sexual abuse and convicted, found not guilty by reason of insanity, or not otherwise acquitted will be required to register as a sex offender with the state's sex offender registry, which is available on-line. Offenders are required to register for at least 10 years and up to the duration of their natural lives, depending on the crime charged. The sex offender is required to provide accurate and current personal information, including the following: photograph, address, place of employment, employer's telephone

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286 720 ILCS 5/11-1.20.

287 720 ILCS 5/11.1.30(b) & (d); 730 ILCS 5/5-4.5-25(a).

288 720 ILCS 5/11-1.40(b).

number, personal telephone number, mobile telephone number, school attended, all email addresses, all instant messaging identities, chat room identities and all other Internet communications identities that the sex offender uses or plans to use, all Uniform Resource Locators registered or used by the sex offender, and all blogs and other Internet sites maintained by the sex offender or to which the sex offender has uploaded any content or posted any messages or information. The information shall also include a copy of the terms and conditions of parole or release signed by the sex offender and given to the sex offender by his or her supervising officer, the county of conviction, license plate numbers for every vehicle registered in the name of the sex offender, the age of the sex offender at the time of the commission of the offence, the age of the victim at the time of the commission of the offence, and any distinguishing marks located on the body of the sex offender. If the offender is a child sex offender, the offender shall report to the registering agency whether he or she is living in a household with a child under 18 years of age who is not his or her own child, provided that his or her own child is not the victim of the sex offence.<sup>289</sup>

## 6 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?

Under Illinois law, “[a]ny person who knowingly performs, offers or agrees to perform any act of sexual penetration ... or any touching or fondling of the sex organs of one person by another person, for anything of value, for the purpose of sexual arousal or gratification commits an act of prostitution.” Prostitution is punishable by imprisonment up to one year, unless committed within 1,000 feet of a school, in which case it is punishable by imprisonment for one to three years.<sup>290</sup> As discussed earlier, rape of an adult is generally punishable by imprisonment for four to 15 years.

Additionally, a number of activities related to prostitution are crimes:

- (a) Solicitation of a sexual act is punishable by imprisonment up to one year unless the person being solicited is under the age of 18 or is severely or profoundly intellectually disabled, in which case the solicitation is punishable by imprisonment for one to three years.<sup>291</sup> It is a defence to a charge of solicitation of a sexual act with a person who is under the age of 18 or who is severely or profoundly intellectually disabled that the accused reasonably believed the person was of the age of 18 years or over or was not a severely or profoundly intellectually disabled person at the time of the act giving rise to the charge.<sup>292</sup>
- (b) Patronizing a prostitute is punishable by imprisonment of one to three years, unless committed within 1,000 feet of a school, in which case it is punishable by imprisonment of two to five years.<sup>293</sup>

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289 730 ILCS 150/3.

290 720 ILCS 5/11-14(a) & (b).

291 720 ILCS 5/11-14.1(b).

292 720 ILCS 5/11-14.1(b-5).

293 720 ILCS 5/11-18.

- (c) Promoting prostitution by soliciting it, arranging or offering to arrange a meeting of people for the purpose of prostitution, or keeping a place of prostitution is punishable by imprisonment of one to three years, unless committed within 1,000 feet of a school, in which case it is punishable by imprisonment of two to five years.<sup>294</sup> Profiting from prostitution by compelling a person to become a prostitute or arranging or offering to arrange a situation in which a person may practice prostitution is also punishable by imprisonment of one to three years unless committed within 1,000 feet of a school, in which case it is punishable by imprisonment of two to five years.<sup>295</sup>
- (d) Promoting “juvenile prostitution,” including individuals under 18 years of age and those who are severely or profoundly intellectually disabled, by soliciting another for the purpose of prostitution where the solicitor is neither the prostitute nor patron, arranging or offering to arrange a meeting of people for the purpose of prostitution, or keeping a place of prostitution is punishable by imprisonment of four to 15 years, unless committed within 1,000 feet of a school, in which case it is punishable by six to 30 years imprisonment.<sup>296</sup> Profiting from juvenile prostitution is punishable by six to 30 years imprisonment. Confining a juvenile against his or her will by threat or infliction of great bodily harm, or administering to the juvenile, without his or her consent or by threat, alcoholic intoxicants or drugs to further prostitution is punishable by six to 60 years imprisonment. Any person convicted of promoting juvenile prostitution is also subject to forfeiture of certain property and proceeds obtained as a result of the unlawful activity. If the accused did not have a reasonable opportunity to observe the prostituted person, it is a defence to a charge of promoting juvenile prostitution that the accused reasonably believed the person was 18 years or older, or was not severely or profoundly intellectually disabled at the time of the act giving rise to the charge.<sup>297</sup>

## H.4 NEW YORK

### 1 Overview of potential sources of compensation for mental suffering of rape victims

In New York, a victim of rape or other sex offence may seek compensation for such person’s associated mental suffering by:

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294 720 ILCS 5/11-14.4(d); 720 ILCS 5/11-14.3(b)(1).

295 720 ILCS 5/11-14.3(b)(2).

296 720 ILCS 5/11-14.4(d).

297 720 ILCS 5/11/14.4(c).

- (a) seeking compensation for otherwise unreimbursed expenses associated with the crime from New York’s Office of Victim Services (“**OVS**”);
- (b) recovering tort damages pursuant to a civil lawsuit filed by the victim; and/or
- (c) receiving restitution payments under the criminal prosecution for the crime.

## 2 Mental suffering as defined by legislation and associated evidentiary requirements

### 2.1 Office of Victims Services

OVS provides rape victims with a mechanism to be reimbursed by the State of New York for certain otherwise non-reimbursed, out-of-pocket expenses incurred for medical care or other services reasonably required as a result of the crime. Mental suffering as a result of a sex offence is not directly compensated by OVS, but a victim may seek reimbursement for expenses associated with counseling undertaken in connection with the crime. Counseling expenses also include the cost of residing at or utilizing services provided by shelters for battered spouses and children.<sup>298</sup>

A victim may recover certain otherwise unreimbursed expenses from OVS only if such person has “suffered personal physical injury as a direct result of a crime.”<sup>299</sup> For purposes of recovering expenses for counseling, the applicable statute specifically provides that a victim of a sex offence is presumed to have suffered physical injury.<sup>300</sup> In addition, where a person makes a claim as a victim of human trafficking or sex trafficking, OVS regulations provide for a rebuttable presumption that such victim has suffered physical injury.<sup>301</sup>

For claims of crime-related counseling expenses filed more than one year after counseling has begun, OVS may require proof that the counseling is causally connected to the crime, and OVS may request an independent medical examination of any claimant before authorizing reimbursement for reasonable expenses of counseling services.<sup>302</sup>

### 2.2 Civil Litigation

A victim of a rape or other sex offence may seek to recover tort damages by filing a civil lawsuit against the perpetrator in a New York court. In a New York civil suit, a rape victim may allege, among others, the torts of intentional sexual assault, battery and IIED.<sup>303</sup>

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298 New York Executive Law § 626(1).

299 New York Executive Law § 621(5).

300 New York Executive Law § 626(1).

301 Practice and Procedure before the Office of Victim Services (OVS Regulations) § 525.20.

302 Practice and Procedure before the Office of Victim Services (OVS Regulations) § 525.12(g)(4).

303 See *Deborah S. v. Diorio*, 153 Misc.2d 708, 583 N.Y.S.2d 872 (N.Y.City Civ.Ct. Feb 18, 1992), aff’d, 160

In New York, courts have recognized that a rape victim may recover compensatory and, in certain cases, punitive damages, for the torts of sexual assault, battery and intentional infliction of mental distress for “mental and emotional anxiety which can be based on the plaintiff’s subjective testimony plus special damages.”<sup>304</sup> In assessing a damage claim in a tort claim for sexual assault, battery and IIED, one New York court acknowledged that “[i]t is very difficult and nearly impossible to quantify in a dollar amount the extreme trauma of any rape experience,” and that “[t]he social and emotional betrayal and humiliation, the isolation, the threat and violation to her self-esteem, physical, psychic and emotional integrity and health, the fear for her life, the utter sense of hopelessness and helplessness, loss of income and therapeutic and medical expenses are among the many factors, this Court must consider and evaluate in assessing compensatory damages for the incident and a reasonable time thereafter.”<sup>305</sup> In that case, the court awarded US\$100,000 in compensatory damages for pain and suffering endured as a result of the rape.<sup>306</sup>

Unlike in a criminal prosecution, which requires proof beyond a reasonable doubt, in a civil case, the victim need only prove the allegations by a preponderance of the evidence. Therefore, even if the criminal case results in an acquittal (or is not brought by the prosecutor), a victim may still be able to succeed and recover damages in a civil suit. However, a civil remedy is only viable if the defendant has assets sufficient to cover any such judgment. Moreover, as discussed in paragraph 4.1 below, any civil damages awarded that compensate the victim for expenses previously reimbursed by OVS would be subject to a lien in favor of the State of New York and therefore must be paid to OVS.

## 2.3 Restitution from Criminal Prosecution

The victim of rape or other sexual assault may also seek restitution in connection with the criminal prosecution of the alleged perpetrator. The New York Penal Code directs criminal courts to consider assessing restitution for actual out-of-pocket losses incurred by crime victims, and in the event restitution is not ordered, courts are required to state the reasons on the record.<sup>307</sup> In awarding restitution, a criminal court must make a finding as to the victim’s out-of-pocket losses, and in determining such amount, the court must consider any victim impact statements, and if sufficient evidence is lacking, the court must conduct a hearing.<sup>308</sup> The amount of restitution may include expenses for counseling, but restitution will not be granted for mental anguish or pain and suffering.<sup>309</sup>

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Misc.2d 210, 612 N.Y.S.2d 542 (N.Y. Sup.App. Term Feb 17, 1994) at 709; 583 N.Y.S.2d at 874.

304 Diorio, at 715; 583 N.Y.S.2d at 878.

305 Diorio, at 715; 583 N.Y.S.2d at 878.

306 Diorio, at 716; 583 N.Y.S.2d at 878.

307 New York Penal Code § 60.27(1).

308 New York Penal Code § 60.27(2).

309 Office of Victim Services, “A Victim’s Guide to Restitution in New York State” (undated).

Any restitution payments received by the victim would reduce the amount of civil damages to be awarded to the victim by such restitution amount, but would not preclude civil damages in excess of the restitution amount.<sup>310</sup> In addition, as with civil damages, any restitution payments awarded that compensate the victim for expenses previously reimbursed by OVS would be subject to a lien in favor of the State of New York and therefore must be paid to OVS. Moreover, restitution payments must be recovered from the defendant, and so will only be available if the defendant has assets sufficient to cover any such judgment.

### 3 Compensation regime for rape victims suffering from mental injury

#### 3.1 Office of Victims Services

To receive reimbursement from OVS for out-of-pocket expenses resulting from a crime, a victim must:

- (a) complete an OVS application and file a claim within one year of the crime;
- (b) furnish supporting materials including police reports, insurance information and identifying information;
- (c) report the crime within a reasonable period of time (within one week, but additional time is provided for victims of sex offences); and
- (d) cooperate with law enforcement officials and OVS.<sup>311</sup>

OVS pursues all claims regardless of whether the perpetrator has been apprehended, prosecuted, convicted or otherwise.<sup>312</sup>

After the investigation and any hearings, OVS will render a written decision either making or denying an award, citing reasons therefor.<sup>313</sup> A claimant may, within 30 days of a decision from OVS, seek reconsideration of such decision by OVS.<sup>314</sup> After conducting a further review, OVS must render its final decision on such matter. If a claimant continues to dispute the OVS decision, such claimant is entitled to seek judicial review in the New York courts.<sup>315</sup>

An emergency award not to exceed US\$2,500 may be granted by OVS if it appears that the claim is one with respect to which an award probably will be made and undue hardship will result to the claimant if immediate payment is not made.<sup>316</sup>

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310 New York Penal Code § 60.27(6).

311 Office of Victim Services, "A Guide to Crime Victims Compensation in New York State" (undated).

312 Practice and Procedure before the Office of Victim Services (OVS Regulations) § 525.5(d).

313 Practice and Procedure before the Office of Victim Services (OVS Regulations) § 525.6.

314 Practice and Procedure before the Office of Victim Services (OVS Regulations) § 525.13.

315 Practice and Procedure before the Office of Victim Services (OVS Regulations) § 525.14.

316 New York Executive Law § 630(1).

## 4 Calculation of Compensation

### 4.1 Office of Victims Services

As discussed in paragraph 2.1 above, OVS may provide victims with reimbursement for out-of-pocket expenses associated with counseling for mental suffering relating to a sex offence. According to the OVS website, counseling costs are paid in accordance with a fee schedule that is based on “reasonable fee rates” determined based on the credentials of the counselor.<sup>317</sup>

OVS is intended to serve as the provider of last resort with respect to crime victim’s out-of-pocket expenses resulting from a crime. Accordingly, acceptance by a victim of an award from OVS subrogates to the State of New York, to the extent of such award, any right or right of action accruing to the victim to recover payments on account of losses resulting from the crime with respect to which the OVS award was made.<sup>318</sup> In addition, acceptance of an OVS award creates a lien in favor of State of New York on the proceeds of any recovery from the perpetrator, whether by judgment, settlement or otherwise, after deducting the reasonable and necessary expenditures, including attorneys’ fees incurred in effecting such recovery, for an amount equal to the total amount of the OVS award.<sup>319</sup> Proceeds subject to OVS lien would include those received pursuant to a civil lawsuit against the perpetrator of the crime, a court-ordered restitution payment or any insurance proceeds.

## 5 The age of consent and the punishment for engaging in under-age sexual activity

Under New York law, a person who is less than 17 years old is deemed incapable of consenting to sexual intercourse or other sexual contact.<sup>320</sup> A person who participates in otherwise consensual sexual activity with a person under the age of 17 is therefore guilty of a criminal sex offence under New York law, commonly referred to as “statutory rape.” In such cases, lack of actual knowledge of the participant’s age is not a defence. However, New York recognizes a defence to the deemed lack of consent of a person under the age of 17 if the act was engaged in with such person’s spouse.<sup>321</sup>

The New York Penal Code classifies sex offences involving under-age persons as follows:

- (a) **Sexual Misconduct:** A person is guilty of sexual misconduct if such person engages in sexual intercourse or oral or anal sexual conduct with another

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317 See <http://www.ovs.ny.gov/Services/VictimCompensation.aspx>.

318 New York Executive Law § 634(1)(a).

319 New York Executive Law § 634(2).

320 New York Penal Code § 130.05(3)(a).

321 New York Penal Code § 130.10(4).

person without such person's consent.<sup>322</sup> There are no age specifications or limitations. As a result, any person who engages in sexual conduct with a person under age 17 would be engaging in criminal sexual misconduct under New York law. Sexual misconduct is a class A misdemeanor under New York law, punishable by imprisonment for up to one year.<sup>323</sup>

- (b) Criminal Sexual Act in the Third Degree: A person is guilty of criminal sexual act in the third degree if such person is aged 21 or older and engages in oral or anal sexual conduct with a person under the age of 17.<sup>324</sup> Criminal sexual act in the third degree is a class E felony, punishable by imprisonment for at least one and a half years and for up to four years.<sup>325</sup>
- (c) Rape in the Third Degree: A person is guilty of rape in the third degree if such person is aged 21 or older and engages in sexual intercourse with a person under the age of 17.<sup>326</sup> Rape in the third degree is a class E felony, punishable by imprisonment for at least one and a half years and for up to four years.<sup>327</sup>
- (d) Criminal Sexual Act in the Second Degree: A person is guilty of criminal sexual act in the second degree if such person is aged 18 or older and engages in oral or anal sexual conduct with a person under the age of 15.<sup>328</sup> However, the statute provides an affirmative defence to the crime if the defendant was less than four years older than the victim at the time of the act.<sup>329</sup> Criminal sexual act in the second degree is a class D felony punishable by imprisonment of at least two years and for up to seven years.<sup>330</sup>
- (e) Rape in the Second Degree: A person is guilty of rape in the second degree if such person is aged 18 or older and engages in sexual intercourse with a person under the age of 15.<sup>331</sup> However, the statute provides an affirmative defence to the crime of second degree rape if the defendant was less than four years older than the victim at the time of the act.<sup>332</sup> Rape in the second degree is a class D felony punishable by imprisonment of at least two years and for up to seven years.<sup>333</sup>
- (f) Criminal Sexual Act in the First Degree: A person is guilty of criminal sexual act in the first degree if

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322 New York Penal Code § 130.20.

323 New York Penal Code § 70.15(1).

324 New York Penal Code § 130.40.

325 New York Penal Code § 70.80(4)(a)(iv).

326 New York Penal Code § 130.25.

327 New York Penal Code § 70.80(4)(a)(iv).

328 New York Penal Code § 130.45.

329 New York Penal Code § 130.45.

330 New York Penal Code § 70.80(4)(a)(iii).

331 New York Penal Code § 130.30.

332 New York Penal Code § 130.30.

333 New York Penal Code § 70.80(4)(a)(iii).

- (i) such person engages in oral or anal sexual conduct with a person under the age of 11; or
- (ii) if such person is 18 or older and engages in oral or anal sexual conduct with a person under the age of 13.<sup>334</sup>

Criminal sexual act in the first degree is a class B felony punishable by imprisonment of at least five years and for up to 25 years.<sup>335</sup>

- (g) Rape in the First Degree: A person is guilty of rape in the first degree if
  - (i) such person engages in sexual intercourse with a person under the age of 11; or
  - (ii) if such person is 18 or older and engages in sexual intercourse with a person under the age of 13.<sup>336</sup>

Rape in the first degree is a class B felony punishable by imprisonment of at least five years and for up to 25 years.<sup>337</sup>

- (h) Course of Sexual Conduct Against a Child: A person is guilty of course of sexual conduct against a child when, over a course of time not less than three months in duration, such person
  - (i) engages in two or more acts of sexual conduct with a child under the age of 11; or
  - (ii) is 18 or older and engages in two more acts of sexual conduct with a child under the age of 13.<sup>338</sup>

Course of sexual conduct against a child in the second degree is a class D felony punishable by imprisonment of at least two years and for up to seven years.<sup>339</sup> Where one of the acts described above includes sexual intercourse oral or anal sexual conduct, the crime is increased to course of sexual conduct with a child in the first degree, which is a class B felony punishable by imprisonment of at least five years and for up to 25 years.<sup>340</sup>

- (i) Predatory Sexual Assault: A person is guilty of predatory sexual assault if such person commits the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, and:
  - (i) in the course of committing such crime, such person:

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334 New York Penal Code § 130.50.

335 New York Penal Code § 70.80(4)(a)(i).

336 New York Penal Code § 130.35.

337 New York Penal Code § 70.80(4)(a)(i).

338 New York Penal Code § 130.80.

339 New York Penal Code § 70.80(4)(a)(iii).

340 New York Penal Code § 70.80(4)(a)(i).

- (1) causes serious physical injury to the victim; or
- (2) uses or threatens to use a dangerous instrument;
- (ii) such person has committed such crime against one or more other persons; or
- (iii) such person has previously been convicted of a felony sex offence.<sup>341</sup>

Predatory sexual assault is a class A-II felony punishable by imprisonment of at least 10 to 25 years, and for up to a life sentence.<sup>342</sup>

- (j) **Predatory Sexual Assault Against a Child:** A person is guilty of predatory sexual assault against a child if such person is 18 or older and commits the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, and the victim is under 13 years old.<sup>343</sup> Predatory sexual assault against a child is a class A-II felony punishable by imprisonment of at least 10 to 25 years, and for up to a life sentence.<sup>344</sup>

## 6 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?

Under New York law, the punishment for the rape or other illegal sexual conduct with an under-age victim is generally more severe than for similar acts with an adult insofar as additional facts must be proved in the case of acts with adults. As described above, the requirements for rape and criminal sexual act for acts with under-age persons generally require certain age-related incapacities, whereas rape and criminal sexual act for acts with adults require proof of additional non-age related lack of incapacity, and in some cases, forcible compulsion.

As noted above, New York law also recognizes the separate crimes of course of sexual conduct against a child and predatory sexual assault against a child, both of which are classified as felonies and carry lengthy sentences.

In addition, in imposing probation or conditional discharge of a convicted sex offender where the victim was under the age of 18, New York courts are required to impose a condition that such offender refrains from knowingly entering any school ground or other facility primarily used by persons under the age of 18.<sup>345</sup>

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341 New York Penal Code § 130.95.

342 New York Penal Code § 70.00.

343 New York Penal Code § 130.96.

344 New York Penal Code § 70.00.

345 New York Penal Code § 65.10(4-a).

## 7 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?

Under New York law, a person is guilty of the crime of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.<sup>346</sup> Prostitution is a class B misdemeanor punishable by imprisonment for up to three months.<sup>347</sup>

In New York, crimes for patronizing a prostitute are more severe than for prostitution itself, and are briefly summarized below:

- (a) Patronizing a prostitute in the third degree: A person is guilty of patronizing a prostitute in the third degree when such person patronizes a prostitute.<sup>348</sup> Such offence is a class A misdemeanor punishable by imprisonment for up to one year.<sup>349</sup>
- (b) Patronizing a prostitute in the second degree: A person is guilty of patronizing a prostitute in the second degree when such person is over the age of 18 and patronizes a prostitute under the age of 14.<sup>350</sup> Such offence is a class E felony punishable by imprisonment for up to four years.<sup>351</sup>
- (c) Patronizing a prostitute in the first degree: A person is guilty of patronizing a prostitute in the first degree when such person patronizes a prostitute who is less than 11 years old.<sup>352</sup> Such offence is a class D felony punishable by imprisonment of at least two years and for up to seven years.<sup>353</sup>

Unlike with the crimes of criminal sexual act or rape, in prosecutions for patronizing a prostitute in the first or second degree, New York recognizes a defence that the defendant did not have reasonable grounds to believe that the prostitute was less than the age specified.<sup>354</sup>

The crimes of permitting, promoting and compelling prostitution are also recognized by New York law, and are classified as follows:

- (a) Permitting prostitution: A person is guilty of permitting prostitution when, having possession or control of premises which such person knows are being used for prostitution, such person fails to make reasonable effort to

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346 New York Penal Code § 230.00.

347 New York Penal Code § 70.15(2).

348 New York Penal Code § 230.04.

349 New York Penal Code § 70.15(1).

350 New York Penal Code § 230.05.

351 New York Penal Code § 70.00(2)(e).

352 New York Penal Code § 230.06.

353 New York Penal Code § 70.80(4)(a)(iii).

354 New York Penal Code § 230.07.

halt or abate such use.<sup>355</sup> Permitting prostitution is a class B misdemeanor punishable by imprisonment for up to three months.<sup>356</sup>

- (b) Promoting prostitution in the fourth degree: A person is guilty of promoting prostitution in the fourth degree when such person knowingly advances or profits from prostitution.<sup>357</sup> Such offence is a class A misdemeanor punishable by imprisonment for up to one year.<sup>358</sup>
- (c) Promoting prostitution in the third degree: A person is guilty of promoting prostitution in the third degree when such person knowingly advances or profits from prostitution by means of owning or controlling a house of prostitution or advances or profits from prostitution of a person under the age of 19.<sup>359</sup> Such offence is a class D felony punishable by imprisonment for up to seven years.<sup>360</sup>
- (d) Promoting prostitution in the second degree: A person is guilty of promoting prostitution in the second degree when such person knowingly advances prostitution by compelling a person by force or intimidation to engage in prostitution or advances or profits from prostitution of a person under the age of 16.<sup>361</sup> Such offence is a class C felony punishable by imprisonment for up to 15 years.<sup>362</sup>
- (e) Promoting prostitution in the first degree: A person is guilty of promoting prostitution in the first degree when such person knowingly advances or profits from prostitution of a person under the age of 11.<sup>363</sup> Such offence is a class B felony punishable by imprisonment for up to 25 years.<sup>364</sup>
- (f) Compelling prostitution: A person is guilty of compelling prostitution if such person is 21 or older and knowingly advances prostitution by compelling a person less than 16 years old, by force or intimidation, to engage in prostitution.<sup>365</sup> Compelling prostitution is a class B felony punishable by imprisonment for up to 25 years.<sup>366</sup>
- (g) Sex trafficking: A person is guilty of sex trafficking when such person intentionally advances or profits from prostitution by certain specified measures including, among others, providing drugs to prostitutes with

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355 New York Penal Code § 230.40.

356 New York Penal Code § 70.15(2).

357 New York Penal Code § 230.20.

358 New York Penal Code § 70.15(1).

359 New York Penal Code § 230.25.

360 New York Penal Code § 70.00(2)(d).

361 New York Penal Code § 230.30.

362 New York Penal Code § 70.00(2)(c).

363 New York Penal Code § 230.32.

364 New York Penal Code § 70.00(2)(b).

365 New York Penal Code § 230.33.

366 New York Penal Code § 70.00(2)(b).

intent to impair judgment, making material false statements to induce such person to continue prostitution, withholding or destroying government identification of a prostitute with intent to impair freedom of movement, and requiring prostitution to be performed to repay debt.<sup>367</sup> Sex trafficking is a class B felony punishable by imprisonment for up to 25 years.<sup>368</sup>

## H.5 TEXAS

### 1 Mental suffering as defined by legislation and associated evidentiary requirements

#### 1.1 Compensation for mental suffering through criminal proceedings

The Texas Penal Code does not include a separate classification for rape, as it is included in the larger category of Sexual Assault.<sup>369</sup> Additionally, the Texas Penal code does not contain special provisions for mental suffering or emotional distress associated with Sexual Assault. However, under the Crime Victims' Compensation Act ("the **Act**"), the Texas legislature has expanded the Crime Victims' Compensation Program ("**CVCP**") (see below) purpose to include providing victims reimbursement for expenses arising from mental suffering and/or emotional distress resulting from Sexual Assault.

#### 1.2 Compensation for mental suffering through civil proceedings

In addition to criminal charges pursued by state and local governmental authorities against the assailant for sexual assault, victims suffering mental illness and emotional distress as a result of such crimes may pursue civil actions against their assailants for actual and

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367 New York Penal Code § 230.34.

368 New York Penal Code § 70.00(2)(b).

369 Under Texas Penal Code § 22.011 Sexual Assault is committed if a person: intentionally or knowingly: (A) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent; (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus or sexual organ of another person, including the actor; or (2) intentionally or knowingly: (A) causes the penetration of the anus or sexual organ of a child by any means; (B) causes the penetration of the mouth of a child by the sexual organ of the actor; (C) causes the sexual organ of a child to contact or penetrate the mouth, anus or sexual organ of another person, including the actor; (D) causes the anus of a child to contact the mouth, anus or sexual organ of another person, including the actor; or (E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

punitive damages. If a defendant is convicted of sexual assault in a criminal proceeding, the presiding judge may also require the defendant to pay the victim restitution damages. Civil cases can be filed independent of criminal cases and do not depend on the outcome of any parallel criminal proceedings. Many victims however, choose to pursue civil actions following guilty verdicts obtained in criminal courts. In contrast to criminal cases, victims must pay for civil cases and associated court costs and attorney's fees directly. Moreover, if a victim obtains a favorable civil verdict and is awarded damages, any recovered monies must be applied to any expenses prior to seeking compensation through the CVCP. In addition, any money awarded to a victim as restitution must also be first applied to crime related expenses. Because the CVCP is considered a "payor of last resort", victims are required to repay any funds received through CVCP if they later receive damages or restitution, up to the amount of the court issued award(s).

Texas does not permit a separate civil recovery for emotional distress resulting from sexual assault or other crimes. State law prohibits victims of sexual crimes from seeking separate civil damages for IIED for claims where civil or criminal statutory remedies already exist (or causes of action which permit recovery of civil damages or awards of restitution exist).<sup>370</sup>

## 2 Compensation regime for rape victims suffering from mental injury

### 2.1 The Texas Crime Victims' Compensation Act

In the State of Texas, innocent victims of violent crimes, including sexual assault victims, can apply for monetary compensation to help with expenses incurred as a result of the crime. In 1979, the Texas state legislature passed the Crime Victims' Compensation Act (the "**Act**"), creating the Compensation to Victims of Crime Fund (the "**Fund**") and the CVCP. The primary purpose of the CVCP and the Fund, which are administered by Texas' Office of the Attorney General, is to encourage greater victim participation in the apprehension and prosecution of criminals and to reimburse victims for certain out-of-pocket expenses resulting from violent crimes.

The Fund broadly encompasses sexual assault crimes under a general definition of any unwanted, non-consensual sexual contact against any individual by another using manipulation, pressure, tricks, coercion or physical force. This includes rape, sodomy, touching or oral sex where the victim is unwilling or unable to give verbal consent, including being under 17 years old, intoxicated, drugged or unconscious. With respect to mental health care, victims can be reimbursed through the Fund for a variety of mental health care treatments, including: outpatient therapy from licensed healthcare providers, in-patient mental health hospital treatment, and residential mental health treatment.

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370 IIED is a "gap-filler" tort, created to permit recovery in "those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress." *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004).

## 2.2 Mitigating factors with regard to the amount of compensation payable

The Act is not required to pay compensation to victims in all circumstances. The Office of the Attorney General requires that victims comply fully with certain requirements to receive compensation benefits specifically, time reporting restrictions and cooperation with law enforcement officials.

Victims must inform the CVCP before filing a civil lawsuit in relation to the crime, if restitution is ordered by a criminal court, or if the victim receives proceeds from a settlement. The CVCP is considered a “payor of last resort” and will only issue payment after all available third-party resources have been exhausted (e.g. Medicare, Medicaid, personal health insurance and settlements). If a victim and/or claimant are awarded damages in a civil suit or receives reimbursement through restitution, the victim must reimburse the Fund for any amounts paid on behalf of the victim, up to the amount received from such award.

## 2.3 Calculation of compensation benefits

### 2.3.1 Reimbursement expenses

Under the CVCP there are no specific reimbursement guidelines for sexual crimes or crimes against children. Under the Act, victims may be approved for compensatory benefits up to a total of US\$50,000.<sup>371</sup> These benefits are designed to cover medical expenses, prescription and rehabilitation expenses, mental health counseling expenses, funeral expenses; loss of earnings or support; child care; reasonable attorney’s fees for assistance in filing the CVCP application and in obtaining benefits, costs associated with crime scene cleanup, and replacement costs for clothing or bedding taken as evidence or made unusable as a result of the criminal investigation.

With respect to mental health care following violent crimes, the CVCP will reimburse victims up to a maximum of US\$3,000 for out-patient therapy from a licensed provider. Approved in-patient mental health care hospital treatment is available for a maximum of 30 days at a rate of US\$600 per day. Approved residential treatment is also available for US\$400 per day.

### 2.3.2 Appeals

If a crime victim or claimant disagrees with a decision of the Office of the Attorney General, then the victim or claimant has a right, under the Act, to seek reconsideration.

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371 A complete description of the reimbursable expenses under the CVCP is available at <https://www.oag.state.tx.us/victims/expenses.shtml#max>.

The appealing party must notify the Office of the Attorney General of their dissatisfaction and provide additional information in the reconsideration process. If the appealing party is again dissatisfied with the outcome of the reconsideration process, they may request a final ruling hearing from the Office of the Attorney General's Crime Victims' Compensation Division. As a last resort, the appealing party may file an appeal of the ruling of the final hearing in their respective state district court.

### 3 Age of consent in Texas and the punishment for engaging in under-age sex

The age of consent in Texas for both males and females is 17 years old but there is a defence for minors who are within three years of age and are engaging in sexual activity as long as the youngest party is older than 14 years of age and the parties are not related. Texas follows the majority of states which have established a two-step scheme that differentiates between sex with a younger child and sexual relations with an older teen. In Texas, children under 14 years of age are classified as legally incapacitated and are not able to consent to any forms of sexual activity.

Under Texas' Penal Code and mandatory sentencing guidelines, sexual assault is classified as a second-degree felony regardless of the age of the victim and punishable by two to 20 years in state prison and a fine of up to US\$10,000. This includes statutory rape of persons younger than 17 years of age. Statutory rape is sex between an adult and a child below the state's age of consent, which is 17 years of age under Texas law. In Texas, statutory rape occurs if an adult has sexual intercourse with a child more than three years younger than the adult, regardless of the child's consent. Furthermore, under the Texas Penal Code, if the victim of any sexual assault crime is younger than 14 years of age, the crime is considered aggravated sexual assault<sup>372</sup> and is automatically elevated to a first-degree felony punishable by a minimum of five years, up to a maximum of 99 years imprisonment and a fine of up to US\$10,000. For any sexual assault crimes against children younger than six years of age, or against children younger than 14 years of age, where the sexual assault was committed in connection with violent aggravated sexual abuse, that is where the child was maimed, wounded, disfigured, or threatened with a deadly weapon, the minimum mandatory sentence is automatically increased to 25 years.<sup>373</sup> Additionally, Texas classifies the Continued Sexual Abuse of a Young Child as first-degree felony crime distinct from sexual assault. Continued Sexual Abuse of a Young Child is defined as two or more incidents of sexual

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372 Aggravated Sexual Assault is typically defined as a sexual assault that maims, wounds, or disfigures the victim, or involves a victim who is incapacitated. Aggravated Sexual Assault, as defined under Texas law, also includes sexual assault that is aided or abetted by another person, occurs during commission of another crime, or involves use of a deadly weapon. Texas classifies Sexual Assault of children under 14 years of age as Aggravated Sexual Assault because 14 year olds are considered legally incapacitated, since they are unable to legally consent to sex.

373 Tex. Penal Code § 22.021.

assault or inappropriate sexual contact, occurring within a 30-day period, with a child under the age of 14 by a person older than 17, and is punishable by a minimum mandatory sentence of 25 years, up to a maximum of 99 years imprisonment and a fine of up to US\$10,000.<sup>374</sup>

#### **4 Is punishment for the rape of an under-age victim more severe than punishment for rape of an adult?**

Punishment for the sexual assault of under-age victims is far more severe than for similar sexual assault crimes committed against adults. Specifically, Texas statutes often increase felony crime classifications for sexual assault of young children and sentencing guidelines mandate significantly longer minimum prison terms. Moreover, persons convicted of any sexual crimes against children under 17 years of age are required to register with the State of Texas as sexual offenders, in publicly available databases.<sup>375</sup> Special designations are also given in such databases for persons committing crimes against young children.

#### **5 Is prostitution a crime? If so, what is the difference in punishment for rape and prostitution?**

As do most states, Texas' prostitution laws criminalize persons who knowingly offer to engage, agree to engage or engage in sexual conduct for a fee.<sup>376</sup>

While the Texas Family Code's juvenile justice code does not have an express provision for prostitution, minors under the age of 17 can be charged for prostitution under a catch-all provision of the Texas Family Code, which defines "delinquent conduct" as behavior that "violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail."<sup>377</sup>

Under Texas law, children under the age of 17 cannot be charged with selling sex or engaging in prostitution. Texas courts have explicitly stated that children under 14 years of age are considered legally incapacitated and unable to consent to sex; therefore, they cannot consent to engaging in sex for hire or prostitution. To date, Texas courts have not issued a ruling specifically directed at children between the ages of 14 and 17 years old, although the high court's ruling is thought to also exempt these minors from prostitution charges.

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374 Tex. Penal Code § 21.02.

375 Tex. Code Crim. P. Art. 62.001.

376 Tex. Penal Code § 43.02.

377 Tex. Fam. Code § 51.03.

Under the current Texas Penal Code, any person who forces or compels, by any means, a child under 18 years of age to engage in prostitution commits “a crime equivalent to using ‘force, threat or fraud’ to compel an adult to commit prostitution.” The crime for forcing or compelling an adult to commit prostitution is classified under Texas law as a Class A misdemeanor, which carries a punishment of up to one year in jail and/or a fine of up to US\$4,000. However, the punishment for forcing a minor to commit prostitution carries a much greater punishment. Texas elevates compelling minors to engage in prostitution to a second-degree felony, which carries a more severe sentence of two to 20 years of incarceration and a potential fine of up to US\$10,000.<sup>378</sup>

Similarly, persons soliciting prostitutes to engage in sex for hire are prosecuted under Texas’ prostitution statute.<sup>379</sup> Crimes involving solicitation of children younger than 18 years of age carry higher penalties than crimes involving solicitation of adults. For example, solicitation of adults for prostitution is classified as a Class B misdemeanor, which can result in punishment of up to 180 days in jail and up to a US\$2000 fine, whereas solicitation of a child 14 to 17 years of age is a second-degree felony and can result in two to 20 years in prison and up to a US\$10,000 fine. More serious punishments are associated with solicitation of children under 14 years of age, which is classified as a first-degree felony and punishable by five to 99 years in a state prison and a fine up to US\$10,000. Under current prostitution laws, a child’s consent is irrelevant and there is no defence that the solicitor had a reasonable belief that the child was at least 18 years of age at the time of solicitation.

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378 Tex. Penal Code § 43.03.

379 Tex. Penal Code § 43.02.

**FRONT COVER PHOTO** A boy plays in a salt pan near Bhavnagar, in the western Indian state of Gujarat.  
REUTERS / Arko Datta



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