Next Steps Towards Reform: Assessing good practice and gaps in Commonwealth sexual offences legislation

Africa

Acknowledgements

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Design and editing: Elle Greet and Leisha Lister.

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About the Equality & Justice Alliance

The Equality & Justice Alliance is a consortium of international organisations with expertise in advancing equality, addressing the structural causes of discrimination and violence, and increasing protection to enable strong and fair societies for all Commonwealth citizens, regardless of gender, sex, sexual orientation, or gender identity and expression.

The members of the Alliance are the Human Dignity Trust, Kaleidoscope Trust, Sisters For Change and The Royal Commonwealth Society.

The Alliance was formed following the Commonwealth Heads of Government Meeting in London in April 2018 during which the then UK Prime Minister Theresa May announced that as Chair-in-Office of the Commonwealth the UK would support Commonwealth governments that want to reform their laws that discriminate against women and girls and lesbian, gay, bisexual and transgender (LGBT) people, many of which are a colonial legacy. The Equality & Justice Alliance was formed to provide this support during the period April 2018 to March 2020, with funding from the UK Foreign and Commonwealth Office in support of the commitments made during CHOGM 2018.

About the Human Dignity Trust

The Human Dignity Trust is an organisation of international lawyers supporting local partners to uphold international and constitutional human rights law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. Over 70 jurisdictions globally criminalise consensual same-sex intimacy, putting LGBT people beyond the protection of the law and fostering a climate of fear, stigma, discrimination and violence. Many of these laws sit alongside other sexual offences laws that discriminate against or fail to protect women, children and other marginalised groups. The Trust provides technical legal assistance upon request to local human rights defenders, lawyers and governments seeking to eradicate discriminatory laws and improve protection against violence and hate crimes.

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About the Research

This research was commissioned by the Human Dianity Trust (the **Trust**) on behalf of the Equality & Justice Alliance,¹ as part of a 2-year programme announced by the UK Government at the April 2018 Commonwealth Heads of Government Meeting (CHOGM) in London² by the then UK Prime Minister, Theresa May.³ A core focus of the 2-year programme is support for reform of colonial-era sexual offences laws that discriminate against women and girls and LGBT+ people, among others. As part of that support, the Trust—with the assistance of experts from around the Commonwealth—is producing research and information designed to inform, inspire and assist Commonwealth governments that are considering embarking on reform of these laws. The research is Commonwealth-focused, enabling member states to learn from other countries in the Commonwealth that have already successfully undertaken reforms. This research complements other independent research that the Trust is undertaking, including a series of practical in-depth case studies on the process of sexual offences law reform in different Commonwealth countries, which will be available on the Trust's website as they are completed.⁴

This report and the information it contains is provided for general informational purposes only. It has been prepared as a work of comparative legal research only and does not represent legal advice in respect of the laws of the jurisdictions of the member countries of the Commonwealth. It does not purport to be complete or to apply to any particular factual or legal circumstances. It does not constitute, and must not be relied or acted upon as, legal advice.

Every effort has been made to reflect accurately each country's laws based on legislation that was publicly available online or provided to the authors at the time of writing (January 2020) and, wherever possible, advice from legal experts in the countries covered in this report.

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PART A: About this Report

OVERVIEW

This report builds on previous research commissioned by the Human Dignity Trust on good practice, human rights compliant sexual offences laws in the Commonwealth. It assesses this legislation in all fifty-three members of the Commonwealth against a series of criteria in the following areas of law:

- Sexual assault, including penetrative and non-penetrative sexual assaults;
- Child sexual assault, including certain problematic defences;
- **Disability and sexual offences,** including sexual assault laws that criminalise sexual activity with people with disability regardless of their capacity to consent to such activity; and
- **Consensual same-sex sexual activity,** including sodomy, buggery and gross indecency laws and discriminatory age of consent laws.

The report provides a snapshot view of some elements of national legislation in the four areas listed above. It is intended to highlight where a country is meeting or failing to meet good practice, human rights compliant standards for key aspects of its criminal law. It is not intended as a comprehensive survey of all criminal law on sexual offences in the Commonwealth.

The report focuses only on the criminal law as provided in **legislation** and does not evaluate the common law or judge-made law (with limited exceptions) or non-legislative instruments, such as subordinate legislation (e.g. regulations), policies and procedures, sentencing guidelines or judges' bench books which may be part of a sexual offences legal framework. Nor does it evaluate the implementation and enforcement of the legislation, which are as critical to good practice sexual offences laws as the legislation itself.

Earlier research commissioned by the Human Dignity Trust focused on defining good practice criteria for sexual offences legislation. These criteria, which are applied in modified form in this report, are based on international human rights law and states' obligations to implement that law at the national level, including through enacting domestic legislation to respect, protect and fulfil human rights. In the earlier research, these good practice criteria were applied to a small sample of Commonwealth countries from each region that demonstrated good practice in one or more areas of sexual offences laws within the scope of the research. The findings are reported in *Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth* (2019) (the *Good Practice Sexual Offences Report*). That report is intended to be used as a companion to this report. It is available online at https://www.humandignitytrust.org.

Importantly, the *Good Practice Sexual Offences Report* contains a detailed description of the good practice criteria and their sources in international human rights law, which is not repeated here. It also evaluates sexual offences laws against a wider range of good practice criteria than are applied in this report, and includes an assessment of how those laws are implemented in a small sample of case studies from across the Commonwealth regions. This more-in-depth approach was taken because the focus was on identifying examples of good practice sexual offences laws and included only a small sample of countries. However, in this report, the focus is on mapping the sexual offences laws of all members of the Commonwealth. In order to facilitate this, the criteria have been streamlined and only address certain key aspects of good practice sexual offences laws.

Each of the criteria applied in the *Good Practice Sexual Offences Report* are critical to an effective, human rights compliant sexual offences legal regime and readers are referred to that report for information on the more inclusive list of good practice criteria.

Good practice criteria for sexual assault laws that were assessed in the *Good Practice Sexual Offences Report* but are not included in this report address penalties, the defence of reasonable and honest but mistaken belief as to consent, special rules of procedure to protect complainants and witnesses, prohibiting marriage between the complainant and accused or compensation payments in lieu of criminal prosecution, and the need for independent and ongoing monitoring of the implementation of sexual assault legislation and to collect and publish sex-disaggregated data on sexual assault from all parts of the justice sector. Also excluded from assessment in this report are some aspects related to sexual offences laws and children and people with disability, as well as in relation to consensual same-sex sexual activity.

Some categories of sexual offences laws were outside the scope of the original research and are not included here. For example, laws criminalising sex work (prostitution), including same-sex sex work, and trafficking are not covered. Legislation criminalising incest, adultery, domestic and family violence, and female genital mutilation (FGM) are not covered. Laws criminalising LGBT+ public advocacy or cultural expression, and affectional, sexual or gender identity expression in public (for example, under public decency laws) are also outside the scope of this study. Each of these areas is an important area of study in its own right.

Age of consent laws of individual Commonwealth countries are not evaluated for good practice in this report. However, we describe key elements for good practice age of consent laws in Part B below because these laws are integral to child sexual offences and are used in some countries to criminalise consensual same-sex sexual activity between people of certain ages, areas of law which this report does address.

How to use this Report

This report is intended primarily for use by government officials interested in reforming their country's sexual offences laws, law reform commissioners and experts, and advocates seeking reform in their country or region. Those working on sexual offences law reform in their country can use this report as a starting point in the law reform process.

The authors acknowledge that there is more than one way to draft good practice sexual offences legislation. This is demonstrated in the research in this and the other regional reports mapping these laws in the Commonwealth. This report is not intended to promote one approach over another, but rather to identify the fundamental, base-line criteria for good practice that any sexual offences law should meet.

However, the report does favour sexual offences legislation that sets out the law in detail to ensure that it is correctly applied by justice sector actors, including police and judges. For example, the report applies good practice criteria requiring that legislation define in detail non-consensual sexual acts, such as sexual or indecent assault, rather than relying on the courts to interpret the scope of the crime. In some jurisdictions, the case law interpreting such provisions and prosecutorial practice may be well-developed, nonetheless some national law reform bodies in these jurisdictions are recommending greater detail be included in the legislation.

The report is divided into three parts. Part A provides the overview and background to the research. Part B describes and briefly explains the good practice criteria used in the study. The criteria address key aspects of sexual offences laws and differ slightly in places from the criteria used in the *Good Practice Sexual Offences Report*.

Part C contains brief country reports and a checklist chart for every Commonwealth country in this region. It also contains a comparative chart for the region as a whole.

The country checklists show at a glance which aspects of a country's sexual offences laws that are addressed in this report meet the good practice standards and which ones fall short of those standards. Where necessary for clarification, short explanations are included. The checklists use the following designations:

- Green the law meets the criteria. An explanation may be provided.
- **Orange** the law partly meets the criteria. An explanation is provided.
- **Red** the law does not meet the criteria. An explanation may be provided.
- **Blue** Unknown. There was insufficient information available to assess the law against the criteria.

TERMINOLOGY

The report uses a number of terms with the following meanings.

- Accused refers to the defendant in a criminal trial for sexual offences.
- Complainant refers to the victim/survivor of a sexual assault in a criminal trial.
- **Good practice** not 'best practice' is used in this report. Laws assessed as meeting the good practice criteria in this report meet fundamental international human rights standards. Good practice requires, at a minimum, that laws be compliant with these standards. As reform is an ongoing process and standards evolve over time, and there may be different models of legislation that are nonetheless all human rights compliant, we refer to 'good practice' laws rather than 'bestpractice' laws.
- **LGBT+** refers to lesbian, gay, bisexual, transgender and other gender nonconforming people and includes people who do not identify with any gender.
- **Person with disability** includes any person, adult or child, with a permanent or temporary impairment that affects their cognitive, intellectual, hearing, vision, mobility or other capacities.
- **Sexual assault** includes all non-consensual penetrative sexual assaults, such as rape, unlawful 'sexual intercourse' or 'carnal knowledge', or however described in law, as well as non-penetrative sexual assaults such as touching or groping.
- **Same-sex sexual activity** refers to any and all sexual acts between people of the same sex or gender.
- **Victim/survivor** refers to any person who experiences sexual assault, including persons killed as a result of or as part of the sexual assault. The term recognises some victims/survivors prefer one term over the other to describe themselves.

SEXUAL OFFENCES LAWS IN THE COMMONWEALTH AND THE NEED FOR REFORM

In each region of the Commonwealth there are some countries that have reformed their sexual offences laws. The extent of these reforms varies. Some have made significant changes, bringing their law into line with good practice standards and international human rights law. Others have only reformed elements of their law, leaving in place some outdated or discriminatory provisions. Several Commonwealth countries were developing reforms at the time of writing.

In many cases, expert local non-government organisations are the drivers of law reform. Drawing on their expertise, often as providers of essential services including as first responders to people who have been sexually assaulted or subject to discriminatory criminal prosecution, they have in many cases led decades-long campaigns for reform and provided essential expert advice on the development of good practice sexual offences laws. Legal development programmes funded by donor countries and agencies have bolstered these efforts and played a critical support role for reform of sexual offences laws in the Commonwealth.

However, as is clear from the findings in this report, the sexual offences laws of most members of the Commonwealth need urgent reform to remove discriminatory provisions and address outdated and prejudicial myths about sexual offences, perpetrators and victim/survivors.



Examples of some common sexual offences laws in the Commonwealth that do not meet good practice

- Sexual assault laws that:
 - limit penetrative sexual assault (e.g. rape) to penile penetration of a vagina;
 - exempt rape in marriage, only criminalise it in certain circumstances (e.g. when a husband uses force or threats of force to coerce his wife to have sex, or when the parties are separated or divorced), or set a lower penalty for marital rape compared with rape outside marriage; or
 - require corroboration of a complainant's evidence;
- Laws that criminalise **consensual sexual activity with people with disability**, regardless of the capacity of the individual to freely consent;
- Child sexual assault laws that:
 - apply only to girls and fail to criminalise a wide range of acts;
 - permit the defence of consent to child sexual assault;
 - do not provide close-in-age exceptions or defences; and
 - set different ages of consent for girls and boys or for same and opposite-sex sexual activity;
- Laws that criminalise consensual same-sex sexual activity (however described in law);
- Laws that use **derogatory language** to describe people with disability (e.g. 'imbecile', 'idiot', 'mental defective') or same-sex sexual activity (e.g. 'buggery', 'sodomy', 'unnatural acts'), or **moralistic language** for sexual assault (e.g. 'defilement', 'indecent assault', 'carnal knowledge').

A country's sexual offences laws, if they are non-discriminatory, properly implemented and enforced consistently and fairly, can play a vital role in protecting people, deterring the commission of offences and providing redress for those affected by violations. Good practice laws also:

- Support the rule of law in general;
- Build confidence in the formal justice system;
- Protect and guarantee fundamental human and constitutional rights;
- Eliminate stigma and abuse of vulnerable or marginalised groups; and
- Encourage positive shifts in attitude and behaviour at a societal and cultural level.

On the other hand, sexual offences laws that are discriminatory or unfair, either on paper or in practice, are ineffective and harm people who are often already the most vulnerable in society, affecting all aspects of their lives. Such laws are:

- Inconsistent with national constitutional guarantees of equality, non-discrimination, dignity and privacy and with international and regional human rights norms; and
- Undermine the rule of law and the authority of the justice system.

They also perpetuate the commission of sexual offences and other violence, stigma and discrimination. For example, a discriminatory rape law will deter victim/survivors from coming forward and reporting the crime. Discriminatory rules of evidence can re-traumatise victim/survivors and can have the effect of denying them access to justice while the perpetrator is not held to account. Differential treatment of different victims of sexual abuse deny people equal protection of the law. Criminalisation of same-sex sexual activity exposes people to a range of very serious harms in violation of their fundamental rights.

Good practice laws are, therefore, essential for the well-being of individuals, their families, communities, broader society and the rule of law.

GOOD PRACTICE LEGISLATION MUST BE IMPLEMENTED AND ENFORCED

Many factors, in addition to good legislation, determine whether a country's sexual offences laws represent good practice. In fact, the best legislation in the world will be ineffective at best and, at worst harmful if it is not well implemented. Good practice legislation requires consistent and non-discriminatory implementation and enforcement to be effective. It also requires the cooperation of other sectors, such as health, child protection, expert non-governmental organisations and service providers. The effective implementation of sexual offences laws therefore also rests on a cooperative multi-sectoral approach. Examples of some positive implementation efforts by Commonwealth countries can be found in the Good Practice Sexual Offences Report.

Analysis of implementation of sexual offences laws is outside the scope of this report which focuses on the legislation. Nonetheless, states are strongly encouraged to:

- **Review their legal framework as a whole**, to ensure it meets good practice, including aspects of sexual offences laws not addressed in this report and non-legislative instruments that provide important guidance to justice sector actors on the correct application of the law (e.g. bench books, sentencing guidelines, policies, police standard operating procedures);
- Ensure that criminal law and procedure do not further victimise sexual offences complainants or act as a deterrent for reporting such offences to police. Laws and rules may appear neutral, but they may have an unintended negative impact on the reporting and prosecution of sexual assault. For example, laws criminalising false reporting of crimes including rape, will deter victims

from coming forward and expose them to criminal prosecution and further victimisation. Laws criminalising adultery and consensual same-sex sexual activity have the same effect. A number of countries in the Commonwealth do not have procedural or evidential laws and court practices that provide for safe and protective circumstances for victim /complainants, including children, to be able to give evidence. These and other laws need to be reviewed as part of a sexual offences law reform process to ensure they are consistent with good practice standards and cannot be applied in a punitive or discriminatory manner;

- Adopt a range of measures for the effective implementation of the law, including providing adequate resourcing, targeted training of all justice sector actors (e.g. in the law, human rights, gender sensitivity, non-discrimination principles), consistent and complementary policies, laws, procedures and practices in corrections, health and education, access to justice programming, public education about legal rights, including human rights, and periodic, independent evaluation of the sexual offences legal framework; and
- **Consult and coordinate routinely** with a range of public agencies, experts and service providers, including from the non-government sector, that routinely interact with law enforcement and the justice sectors in the context of sexual offences (e.g. child protection, health, forensic pathology, corrections, legal aid and women's, children's, disability and LGBT+ non-governmental organisations, service providers and advocates).

INTERNATIONAL & REGIONAL HUMAN RIGHTS LAW AND SEXUAL OFFENCES LEGISLATION

International human rights law requires states to take a range of measures, including enacting effective and non-discriminatory laws, to respect, protect and fulfil human rights. Discriminatory sexual offences laws are inconsistent with the foundational human rights principles of substantive equality and the respect for the inherent dignity of every person. They may also violate a range of other specific human rights norms including:

- equality before the law and equal protection of the law;
- freedom from discrimination in the enjoyment of all fundamental rights;
- respect for human dignity;
- right to privacy;
- protection of bodily integrity, including freedom from torture and cruel, inhuman or degrading treatment or punishment;
- protection of children from abuse and exploitation; and
- the rights of people with disability to autonomy, including sexual autonomy.

The specific legal obligations of states under international human rights law underlie the good practice criteria used in this report, which are derived from international and regional human rights treaties. For more information on applicable international legal norms, see the *Good Practice Sexual Offences Report*.

United Nations human rights treaties⁵

- International Covenant on Civil and Political Rights (ICCPR),
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),
- Convention on the Rights of the Child (CRC),
- Convention on the Rights of Persons with Disabilities (CRPD),
- Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**).

Regional human rights treaties and declarations

- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),⁶
- Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará),⁷
- Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention),⁸
- Declarations on the Elimination of Violence against Women in the ASEAN Region,⁹ and
- Pacific Leaders Gender Equality Declaration 2012.¹⁰

Other international instrumentS

• Yogyakarta Principles +10, Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles.¹¹

Human rights treaty bodies and others have given general and country-specific commentary and guidance on how states can meet their treaty obligations, including by reforming their sexual offences laws, through general comments and recommendations and observations on individual countries as part of the periodic review process (e.g. the 'UPR'). For example, the CEDAW Committee has issued two General Recommendations (GR) on violence against women, GR 19 in 1992 and GR 35 in 2017,¹² and made numerous observations over many years on states' implementation of CEDAW at the national level.

Some agencies have further distilled the advice from the treaty bodies into practical guidance for states. For example, UN Women have published the guide, Handbook for Legislation on Violence against Women (2012) (**UN Handbook**) and its Supplement on Harmful Practices.¹³ These explain in detail how to make national laws on violence

against women, including sexual violence, that would meet states' international human rights legal obligations. Although both Handbooks focus on violence against women, they are relevant to making laws on sexual assault against any person. It is therefore recommended that those interested in sexual offences law reform refer to the Handbooks.¹⁴

The Handbooks have informed several regional guidelines, such as the Guidelines on

Combating Sexual Violence and its Consequences in Africa (**Niamey Guidelines**),¹⁵ adopted by the African Commission on Human and Peoples' Rights, and the *Pacific Island Forum Sexual Offences Model Provisions 2010*. The UN Handbooks have also informed the development of the good practice criteria used in this report.

What is clear from the treaties, commentary and guidance is that good practice sexual offences laws must be non-discriminatory, protect an individual from harm, and respect their personal agency and bodily integrity. Where laws create criminal offences, they must also appropriately balance the competing interests of the rights of an accused person to a fair trial with the rights of a complainant. Laws that do not meet these fundamental standards will harm individuals affected by sexual offences and undermine the rule of law and the criminal justice system.

PART B: About the Good Practice Criteria

1. Sexual Assault Universal Criteria

This Part briefly explains the criteria used in the country checklists in Part C below to assess whether a country's legislation on sexual assault and consensual same-sex sexual activity meet good practice. A 'traffic light' system is applied to the relevant law of each Commonwealth country to illustrate whether that law meets the good practice criteria explained in this Part.¹⁶

- **Green light'** the law fully meets the criteria. An explanation may be provided.
- **Orange light'** the law partly meets the criteria. An explanation is provided.
- **'Red light'** the law does not meet the criteria. An explanation may be provided.
- ? 'Blue light' insufficient information to assess the law against the criteria.

The criteria are derived from international human rights law, including key international and regional human rights treaties, and their interpretation by expert bodies.

While the past half century has seen significant reforms to national rape and sexual assault laws, including in the Commonwealth, many countries retain archaic laws that are based on and perpetuate false, discriminatory and damaging myths about sexual assault and about victim/survivors and perpetrators.¹⁷ These include exceptions for rape in marriage (women are the property of their husbands), requiring corroboration of a sexual assault complaint (women and girls lie about rape and sexual assault), defining rape only as penile penetration of a vagina (men and boys are not raped or sexually assaulted), allowing evidence of prior sexual conduct or reputation (only chaste women can be raped and sexually assaulted, the victim is to blame), assuming that young children can consent to sexual activity (willingness is the same as consent) and criminalising consensual sex with people with a disability (they don't understand the nature of the act, can never give free consent or should not be sexually active).

These and many other myths, and the legal rules that maintain them, cause harm and undermine the criminal justice system. They prevent or deter people from reporting sexual assault, expose survivors to re-traumatisation, shield perpetrators from justice and restrict or prevent access to justice for victim/survivors.¹⁸ They blame the victim/survivor for what has happened and give excuses to the perpetrator for their actions and behaviour.



SEXUAL ASSAULT: THE CRITERIA EXPLAINED

Definition and scope of the crimes

a. Sexual assault crimes are gender-neutral: Definitions of sexual assault offences must not exclude any potential victim/survivor or perpetrator, regardless of sex, gender, sexual orientation, gender identity, age, disability status, marital status or any other status. All victim/survivors should have equal protection of the law.

In some Commonwealth countries penetrative sexual offences, such as rape and child rape, are conceived in law (and in common understanding) as a crime that can only be committed by a male against a female. Accordingly, in many countries rape is limited to sexual intercourse and the penetration of a vagina by a penis. Excluding the rape of males is discriminatory and not good practice. Some countries that maintain 'buggery' and 'sodomy' laws may criminalise nonconsensual anal sex under such provisions. However, good practice requires the repeal of these crimes and for anal 'rape' to be included in the general sexual assault provisions, for example as 'rape' and 'sexual assault', and in child sexual offences. All of these crimes should be gender-neutral.

Meeting this good practice criteria does not preclude including <u>additional</u> specific offences of violence against women and girls, for example in acknowledgement that they are overwhelmingly the target of many forms of violence, including sexual assault and domestic violence. This is an approach a small number of countries have taken.

b. **Marital rape and sexual assault are crimes:** The legislation should expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.

'Marital rape immunity' remains in the law of some Commonwealth jurisdictions either as a blanket exemption or as a defence in limited circumstances, such as if force is used or the parties are judicially separated or divorced. Many countries simply do not address marital rape in their legislation at all.

Marital rape immunity is based on the outdated belief that wives cannot be raped because at marriage they consented to all sexual acts with their husband. This view is discriminatory on the grounds of sex and marital status and denies women their fundamental right to autonomy and bodily integrity and to be free from torture and cruel, inhuman or degrading treatment. It treats wives as male property.

The UK House of Lords overturned an old common law rule exempting husbands from criminal liability for raping their wives $(R \ v \ R)$.¹⁹ Many countries around the world, including in the Commonwealth, have abolished this exemption legislatively or by jurisprudence. The common law and national case law are not assessed in this report and to meet the good practice standards applied here, legislation should state that marital rape and sexual assault, including of married children, are crimes and that there is no exception for, or defence of marriage to these offences.

c. **Free and voluntary consent is required:** The legislation should expressly define consent to require free and voluntary agreement to sexual activity. The law should also explicitly recognise that there are circumstances in which genuine consent cannot be given. These circumstances should be listed in the legislation in a non-exhaustive list.

Most sexual assault laws in the Commonwealth do not define 'consent' at all, merely stating that rape is sexual intercourse without consent or with the use or threat of force, or when a person was deceived into sexual intercourse (the perpetrator impersonates the victim/survivor's husband), or when the victim/ survivor was incapable of understanding the nature of the act due to their age or impairment. Some countries include a longer list of circumstances where there can be no consent including for example:

- where the perpetrator took advantage of, or created a coercive situation, such as use or threat of force or the exercise of coercive control in cases of domestic violence or unlawful detention;
- where the victim/survivor cannot give free and voluntary consent because they were a child, asleep, unconscious, physically immobilised or restrained, incapacitated by alcohol or drugs, or by a temporary or permanent illness, disability or impairment that prevents them from giving free and voluntary consent or with limited or no capacity to communicate their consent or non-consent;
- where the perpetrator was in a position of trust or authority in relation to the victim/survivor, or the victim/survivor was under the care and/or control of the perpetrator.

Where such lists exist in the law, they are not evaluated.

This report does not address the defence of reasonable or honest but mistaken belief as to consent. This defence is an important safeguard of the rights of an accused person. However, good practice requires the rights of the accused to be balanced with the rights of a complainant. For this reason, where this defence is available, sexual offences laws should expressly require a defendant to show they took reasonable steps to confirm that the person was consenting to the sexual activity. This defence should not be available in circumstances in which the law presumes consent cannot be given, such as those outlined above.

d. **Evidence of resistance is not required:** The legislation should make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It should also make clear that consent cannot be inferred from a complainant's silence or submission during the assault.

Requiring proof of resistance as evidence that there was no consent is based on discriminatory and erroneous myths, including that 'real rape' always involves force, victim/survivors always try to fight off their attacker and that women lie about rape and other sexual assaults. There are many circumstances in which genuine consent cannot be given and there are many reasons why a victim/survivor may not physically resist their attacker or might appear to submit to sexual assault even in the absence of the use or threat of force.

Some Commonwealth countries have made clear in their law that evidence of resistance by the victim/survivor is not required and that submission or silence is not consent. This approach fully meets this criterion. Defining consent as free and voluntary agreement, with a list of situations in which there can be no consent, does not, on its own, meet this criterion because evidence of resistance to prove that there was no such agreement may still be required by a court. In several Commonwealth countries, there is an express requirement for evidence of force or violence to prove there was no consent. This is not good practice.

e. All non-consensual sexual acts involving penetration are offences: Good practice sexual assault laws must be broadly defined and cover non-consensual sexual penetration of any orifice (mouth, vagina, anus) by any body part (not limited to a penis) or object.

Laws on rape and other penetrative sexual offences in many Commonwealth countries continue to define the crime as the penile penetration of a vagina. This is not good practice as it excludes rape of males and other ways in which nonconsensual penetrative sexual conduct occurs, as well as same-sex penetrative sexual assaults. This approach also treats vaginal rape as more serious than other forms of penetrative sexual assaults, which does not reflect the harm caused to the victim/survivor.

Some jurisdictions criminalise rape as the non-consensual penile penetration of a vagina and cover other forms of non-consensual sexual penetration, including of males, as part of other sexual offences, such as indecent or sexual assault. These jurisdictions may satisfy this criterion if they criminalise all such conduct equally, including prescribing the same penalty. However, if these offences are not treated as seriously with appropriate penalties, they may not meet the good practice criteria. Better practice would be to make all crimes of penetrative sexual assault genderneutral and object and orifice inclusive. Laws criminalising non-consensual anal sex as 'buggery' or 'sodomy' are not good practice either. These crimes should be repealed and anal rape of any person (male or female) should be covered under gender-neutral sexual assault provisions and child sexual offences.

f. All non-penetrative, non-consensual physical sexual acts are criminal offences: Good practice sexual assault laws must be defined broadly to include all kinds of non-penetrative assaults of a sexual nature.

Contrary to good practice, many sexual offences laws in the Commonwealth do not define these offences, which are commonly called 'indecent' acts or assaults. Such laws may be interpreted by local courts to cover the acts in question, but this is not transparent or clear and may be more likely to lead to a narrow interpretation, excluding a range of assaults of a sexual nature from the criminal law. These offences should be clearly and broadly defined in legislation to include, at least, non-consensual touching, groping or physical contact of a sexual nature, whether over or under clothes, for example of genitals, breasts or anus using any body part (including semen) or object, as well as using genitals to touch any part of the body. They should also include any act of sexual stimulation and forcing a person to perform sexual acts on themselves or others, or to watch such acts.

The use of the term 'indecent' act or assault, while a common feature of sexual offences laws in Commonwealth jurisdictions, is not good practice because it treats the crime as a moral attack rather than as a violent assault. These crimes should be re-named and characterised as assaults of a sexual nature.

Rules of evidence and procedure

g. No corroboration required: Legislation setting out rules of evidence in criminal proceedings for sexual assault should state that no corroboration by a third party of the complainant's testimony is required.

The rule on corroboration is a common law exception to the hearsay rule imported into many Commonwealth countries by the British colonists. The rule requires a third party to corroborate a complaint of sexual assault. The rule is clearly discriminatory. It is often not applicable to other criminal offences, including those that occur in private, and it is based on the damaging and false myth that women and girls lie about rape and other sexual assault.

In a case on appeal from Grenada, the Privy Council held that there is no requirement at common law for corroboration in sexual assault cases and that it was up to the judge to determine if it was necessary to warn the jury about the reliability of any uncorroborated evidence ($R \ v \ Gilbert$ (2002) 61 WIR 174). A number of courts around the Commonwealth have made similar findings and some Commonwealth countries have expressly abolished the rule in their legislation.

Common law rules of evidence, including on corroboration of sexual offences, are not assessed in this report. Where legislation does not expressly exclude corroboration in relation to sexual offences, regardless of the common law position in that country, the law does not meet this good practice criterion. Good practice sexual offences laws for the purpose of this report require its express abolition by legislation. The harmful impact of the corroboration rule

[The corroboration rule's] effect has been to place victims of sexual offences in a special category of suspect witnesses ... It has given accused ... a protection which does not exist in other cases of serious criminality, and it almost certainly has had the effect, in many instances, of deterring rape victims from reporting offences committed against them, or from co-operating in the prosecution of offenders.

Attempts have been made, from time to time, to justify the rule by reference to a wide range of reasons, including a supposed tendency in women to engage in fantasy, to be fickle or spiteful in sexual relationships, to be prone to sexual neurosis, or to be unwilling to admit to consent out of shame.

However forcefully these reasons are propounded, along with the associated rape myths ... we consider that they have reflected a flawed understanding of the world, they have been unfairly demeaning of women, and they have been discredited by law makers, in more recent times.

- Fiji Court of Appeal - Balelala v State [2004] FJCA 49

h. **Prior sexual conduct is inadmissible and irrelevant:** Legislation should provide a presumption that evidence of the prior sexual conduct of the complainant with the accused or another person, as well as their 'sexual reputation', is inadmissible or only admissible with prior leave of the court and with strict safeguards.

Good practice on this point requires balancing the rights of an accused person to a fair trial with the rights of a complainant to equal protection of the law, privacy and dignity. Evidence of a complainant's prior sexual history is generally irrelevant, yet it has been and is often allowed to discredit the complainant herself, as well as her evidence that she did not consent to the sexual activity that is the subject of the criminal complaint. Providing that such evidence is inadmissible protects complainants from irrelevant questioning that is often traumatising and which violates their privacy. Allowing evidence of a complainant's prior sexual conduct or sexual reputation is not good practice as it allows an inference of consent to be drawn from irrelevant factors.

A small number of Commonwealth countries have excluded such evidence altogether, while others may allow it with the leave of the court in limited circumstances, such as when it relates directly to the sexual activity that is the subject of the charges and has a very high probative value that outweighs any potential prejudice to the proper administration of justice or the complainant's personal dignity and right to privacy. Depending on the extent to which such evidence is allowed and which safeguards are put in place in the law, this approach may meet good practice standards.

Crimes of power and violence not morality

i. **Terminology in sexual assault laws is legal and not moralistic:** Sexual offences provisions should use neutral and precise legal terminology that is not moralistic and does not perpetuate discriminatory stereotypes.

Use of terms such as 'defilement', 'insulting modesty', 'offences against morality' or 'honour' and 'indecent assault' are used to describe sexual offences in the criminal laws of many Commonwealth countries. For example, the crime of 'defilement' is an archaic concept meaning 'to pollute' or 'to sully' and, in the context of sexual offences, usually refers to the sexual assault of girls. It is a discriminatory term as it indicates that girls are 'spoilt' or 'damaged' through the loss of their virginity. Properly viewed, the rape and sexual assault of any person are attacks against their physical and mental integrity and sexual autonomy. They are unrelated to the 'modesty' or 'honour' of the victim/survivor or their family.

Sexual violence has often been addressed in the problematic framework of morality, public decency and honour, and as a crime against the family or society, rather than a violation of an individual's bodily integrity.

— United Nations Handbook on Legislation for Violence Against Women 2012, p24

2. Sexual Assault Additional Criteria in Relation to Children

The general criteria outlined above apply equally in relation to children. The following are additional criteria with specific application to the particular situation of children.

All Commonwealth countries have specific child sexual assault offences. However, the laws of many are inadequate and discriminatory and do not meet good practice standards. For example, many countries do not criminalise a wide range of child sexual assault, limiting protection only to unlawful sexual intercourse with children and not expressly including offences such as grooming. Some countries only criminalise sexual activity with girls, which is discriminatory on the grounds of sex and not good practice. Even where countries have child sexual assault offences in their legislation, they are often undermined by allowing the defence of consent and not providing appropriate close-in-age defences.

Children under the age of consent should be presumed in law not to be able to consent to sexual activity (except in close-in-age situations), including in marriage. Good practice child sexual assault laws should allow 'close-in-age' defences to protect children and young people under the age of consent from criminal prosecution for engaging in consensual sexual activity with their peers.

Many Commonwealth countries provide for a defence of reasonable and honest but mistaken belief as to the age of a child. This defence is not assessed in this report. While this defence is an important safeguard of the rights of an accused person, good practice requires a balance between the rights of the accused and the rights of a complainant. For this reason, where this defence is available, sexual offences legislation should expressly require a defendant to show they took reasonable steps to confirm that the person was over the age of consent. In order to protect children, it must include an objective test to determine if the accused person's belief as to the age of the complainant was reasonable in the circumstances.

Age of consent laws and close-in-age defences

Laws governing the age at which a person can consent to sexual activity underlie all child sexual offences and are also relevant to laws on minimum age for marriage. This report does not assess the age of consent laws of individual Commonwealth countries or their minimum marriage age. It does, however, note the age of consent (where one exists) in each country and evaluates whether that law is discriminatory on the basis of sex, gender, sexual orientation or gender identity.

Practice on age of consent to sexual activity varies around the world, including in the Commonwealth. Most Commonwealth countries set the age of consent for opposite-sex sexual activity at 16 years with some opting for a higher age of 18 (e.g. Rwanda) and some a lower age, for example 14 years (e.g. Namibia). Some countries provide for a lower age of consent for girls than for boys (e.g. Bangladesh). Some countries also discriminate in their age of consent law on the basis of the kind of sexual activity or whether it is same-sex or opposite-sex sexual activity (e.g. Bahamas). All such distinctions are discriminatory and do not meet good practice standards.

Under international law, children and adolescents have rights as well as evolving capacities to make decisions that affect themselves. Good practice age of consent laws, therefore, strike the right balance between protecting the rights of children and young people to be free from exploitation and other harms, including sexual abuse, and protecting their other fundamental rights, including to privacy and healthy sexual development. This is the approach also recommended by the UN Committee on the Rights of the Child.²⁰

It follows that good practice age of consent laws must be non-discriminatory, clearly set out in the law and not allow exceptions for child marriage or on the basis of culture or religion. They must be set neither too low nor too high. A low age of consent exposes children, and especially girls, to sexual abuse and child marriage and undermines the child sexual offences legal framework. Setting the age of consent too high can have the effect of stigmatising and criminalising adolescents who engage in consensual sexual activity with each other and may drive child marriage.

In some societies, parents' desire to preserve their daughters' "sexual purity" prior to marriage may drive early marriage. In many societies, adolescents may feel the only way they can have sex—and access sexual and reproductive health information and services—is by being married, which again, may drive early marriage. It also increases barriers to accessing sexual and reproductive health services, further endangering young people.²¹

Providing for close-in-age defences in the legislation is also essential to prevent the criminalisation and stigmatisation of genuinely consensual sexual activity between peers, where there is a small gap in age between them (e.g. 2-5 years) and where one or both are under the age of consent.

However, there should be no close-in-age defence if there is a relationship of trust, authority, supervision or dependence between the parties (e.g. teacher, care-giver, employer, employee in an institution where the young person lives or studies, sports coach, religious leader). The law should also make clear that there is no such defence even if the older party is also a child but uses threats, coercion or pressure.²² Excluding close-in-age defences in these situations addresses potential power imbalances between the parties and helps to protect children from exploitation or abuse by another child or young person.

This report does not evaluate the close-in-age laws of individual Commonwealth countries, but it does consider the availability of this defence in the assessment of child sexual assault provisions against the good practice criteria.

International human rights law does not specify a minimum age of consent to sexual activity. However, based on the principles under the *Convention on the Rights of the Child* and other human rights standards, it is recommended that the age of consent be set at between 16-18 years of age, provided that appropriate close-in-age defences are also in place.

THE CRITERIA EXPLAINED

Definition and scope of sexual offences against children

a. **There are specific child sexual assault offences:** Sexual offences legislation should include specific child sexual assault offences, including penetrative and non-penetrative sexual offences.

Children and young people face particular vulnerabilities to sexual abuse and exploitation due to their age, their social status and their dependency on adults. Good practice laws must criminalise specific penetrative and non-penetrative sexual offences against all children and young people, including for example, rape, sexual assault, including touching and groping or other contact of a sexual nature, as well as grooming and sexual communication with a child. Other specific child offences that are not addressed in this report should also be explicitly provided for, including child sexual exploitation, trafficking, persistent child sexual abuse, FGM and voyeurism.

The legislation must provide appropriate close-in-age defences or exceptions for consensual sexual activity between young people when one or both of them is under the age of consent and they are close-in-age. However, this defence should be excluded if there is a relationship of trust, authority or dependency between the child and the other person, or any other coercion, exploitation or pressure of the child.

b. Child sexual assault offences are gender-neutral: Child sexual assault offences should be gender-neutral. Any child, regardless of sex or gender, sexual orientation or gender identity, or any other characteristic, can be raped or otherwise sexually assaulted. The definitions of crimes should not exclude any potential victim/survivor.

Some countries still explicitly limit child sexual assaults to girls, for example in 'defilement'-type offences. This approach is discriminatory on the basis of sex. It is based on, and perpetuates the false myth that only females can be raped or subjected to other sexual assaults. It denies male children protection from abuse while protecting abusers. Child sexual assault laws that are not gender-neutral also violate fundamental rights under many human rights treaties, including the *Convention on the Rights of the Child,* to which every Commonwealth country is a party.

c. There is no defence of consent to child sexual assault offences (other than close-in-age defences): The defence of consent should be expressly excluded from child sexual assault laws (e.g. 'statutory rape').

Children under the age of consent should be presumed in law not to be able to consent to sexual activity except when close-in-age.

Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood...

 United Nations Standard Rules for the Equalization of Opportunities for Persons with Disabilities, Rule 9

3. Sexual Assault Additional Criteria in Relation to People with Disability

The general criteria and the criteria relating to child sexual offences outlined above apply equally in relation to all persons (including children) with disability. The following are additional criteria developed to have specific application to persons with disability.

Sexual assault laws in many countries across the world, including in the Commonwealth, reflect outdated and prejudiced attitudes towards people with disability. This is evident in the common use of derogatory language in sexual offences laws to describe people with disability, for example, 'idiot', 'imbecile', 'defective' or 'subnormal'. It is also evident in the underlying assumptions reflected in the law that people with disability:²³

- · never have any autonomy and so cannot consent to sexual activity,
- always are incapable of understanding the nature of sex,
- should not be sexually active, and
- are inherently vulnerable to violence and abuse, rather than made vulnerable by the social and structural systems that constrain and control their lives and fail to support them to exercise their legal capacity.

A common response in sexual offences laws to these assumptions is to criminalise all sexual activity with a person with a disability (usually limited to cognitive or intellectual disability or mental illness), in an effort to protect them from sexual exploitation and abuse.

These assumptions are based on negative and ill-informed stereotypes about people with these types of disability. They are inconsistent with human rights law to the extent that they undermine or deny people with disability their rights to equality and non-discrimination, to personal autonomy, and to equality before the law, including the right to make decision about issues that affect them. In other words, to exercise their 'legal capacity'.

At the same time, the international human rights framework requires that countries protect the right of people with disability, like everyone else, to be free from violence. Global data consistently show that people with disability face greater risk of all forms of violence than people without disability.24 The data also show that the risk is particularly acute for women and girls with disability, and people with disability whose day-to-day lives are managed or constrained by others, such as in institutional or congregate care settings, or in heavily controlled family settings. These risks are exacerbated by the invisibility experienced by many people with disability, both through attitudes that seek to hide disability or those that seek to be overly protective.

Good practice sexual offences laws should be disability-neutral. They should provide the same regime for determining whether a person has freely and voluntarily consented to sexual activity for people with disability and people without disability. Similarly, situations that should be recognised in the law when genuine consent cannot be given, such as incapacity or abuse of trust or authority, should apply to all people. Any person, whether they are a person with disability or not can be affected by such factors temporarily, permanently or intermittently.

THE CRITERIA EXPLAINED

Sexual offences laws treat people with disability equally

a. **Consensual sexual activity with a person who has a disability is not an offence:** Consensual sexual activity should not be criminalised solely on the basis that one or more of the participants is a person with disability. Sexual assault laws should not assume that all or any persons with disability are incapable of freely and voluntarily agreeing to sexual activity or understanding the nature of it.

The test for consensual sexual activity with a person with a disability should be the same as for a person without disability – the giving of free and voluntary agreement. Similarly, situations recognised in the law in which genuine consent cannot be given, such as actual incapacity or abuse of trust or authority, such as in a care facility, should apply to all people. Any person, whether they are a person with disability or not, can lack capacity to consent freely and voluntarily either temporarily or permanently. The legislation should not impose additional protective measures merely on the basis of a person's disability and regardless of whether they have the capacity to give, and have given, free and voluntary consent to the sexual activity. However, it may be consistent with good practice to provide for higher penalties for sexual offences against people with disability where there is no genuine consent or to provide that abuse of a trust or care relationship is an aggravating factor to be considered in sentencing. Criminalising all sexual activity with people with disability, however, is paternalistic and violates a person's fundamental rights to legal capacity, equality and non-discrimination.

b. No discriminatory, derogatory or stigmatising language is used: Discriminatory, derogatory or stigmatising language must not be used in sexual offences laws to refer to people with disability. These include terms such as 'idiots', 'imbeciles', 'mentally subnormal', 'mental defective' and 'handicapped'. Good practice laws should refer to 'people', 'persons' or 'person' with disability, in accordance with the language of the UN Convention on the Rights of Persons with Disabilities.

4. Consensual Same-Sex Sexual Activity Criteria

Every human population includes members who are same-sex attracted and who find happiness and fulfilment in an intimate, emotional and sexual relationship with another person of the same sex. It is widely understood and accepted in the international legal and scientific communities that this is a normal variant of human sexuality. However, there is a long history, particularly across the Commonwealth, and in certain other countries in the world, of criminalising consensual same-sex sexual activity. States use a range of terms for these offences, such as buggery, sodomy, unnatural acts, gross indecency, same-sex sexual relations, homosexual sex, lesbianism and acts against the order of nature. Often these acts are dealt with in the same provision as the crime of bestiality, which exacerbates the stigmatising impact of the crimes. In addition to criminalising consensual same-sex sexual activity or activity that is more associated with same-sex attracted people, some countries also criminalise any public display of same-sex relationships directly or indirectly (e.g. Nigeria).

In the Commonwealth, the numbers are well known: as of October 2019, 35 of the 53 member states (including associated jurisdictions) still criminalise consensual sexual activity between people of the same sex.²⁶ While these figures are stark and highlight the need for urgent action on legislative reform across the Commonwealth, some progress has been made with national courts finding criminalisation to be unconstitutional and striking down the offending provisions in the criminal law, for example, in South Africa and Fiji and more recently in Belize, Botswana, India and Trinidad and Tobago. Legislatures in a number of Commonwealth countries have also taken steps recently to repeal these laws, including in Mozambique, Nauru and Seychelles.

There is extensive literature and an ever-growing body of empirical research showing that criminalising consensual same-sex activity causes a wide range of serious, identifiable harms, including murder, sexual violence, discrimination in all spheres of life, social exclusion, harassment and unlawful detention, removal of children from and denial of custody of children to their parents, poor health, such as depression, suicide and self-harm and HIV/AIDS, and limited access to basic services, including health, education, housing and legal services.

A clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization...

[Criminalising] laws foster a climate in which violence against lesbian, gay, bisexual and transgender persons by both State and non-State actors is condoned and met with impunity.

— UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2016

Criminalisation of consensual same-sex sexual activity is also contrary to international human rights law and the fundamental principles of equality, non-discrimination and the right to privacy and leads to violations of many other fundamental human rights. This has been confirmed, for example, by the European Court of Human Rights, which has found that laws criminalising same-sex sexual activity violate the right to privacy under the *European Convention on Human Rights*.²⁶ The UN Human Rights Committee has also been very clear that human rights law prohibits criminalisation of consensual same-sex sexual activity. For example, in its landmark 1994 decision in *Toonen v Australia*,²⁷ the Committee said that a state law in Australia (Tasmania) criminalising consensual sexual activity between men violated the right to privacy and non-discrimination on ground of sex under the *ICCPR*. It said that the law violated human rights even though it was not enforced.

Since *Toonen*, other UN treaty bodies have repeatedly urged states to reform their laws criminalising consensual same-sex conduct because they violate fundamental human rights norms.²⁸

States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination.

— UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2016

Reinforcing the impact of these decisions have been a number of important declarations, including:

• the African Commission on Human and Peoples' Rights *Resolution 275 on protection against violence on the grounds of sexual orientation and gender identity*, which condemns human rights violations, including arbitrary imprisonment and other forms of persecution based on sexual orientation or gender identity;²⁹

- the 2016 report of the former UN Special Rapporteur on Torture, Juan Mendez, linking the criminalisation of same-sex activity to increased violence against LGBT+ people; and
- the Yogyakarta Principles plus 10 that make an unequivocal case for decriminalisation.³⁰

In some countries in the Commonwealth, these crimes are expressed in gender-neutral terms and apply both to consensual and non-consensual acts. This is not good practice. These offences should be repealed and all non-consensual sexual acts, including anal 'rape' of any person, should be criminalised as part of gender-neutral sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences.

Some countries that have repealed their offences on same-sex sexual activity maintain or create a different age of consent for same-sex sexual activity or sexual activity that is more associated with same-sex attracted people, such as anal sex. Not only is this discriminatory, it means the country has not fully decriminalised. It also exposes people engaging in such conduct to the same harms listed above. Therefore, it is not human rights compliant nor good practice.

THE CRITERIA EXPLAINED

Same-sex sexual activity is not a crime

a. **Consensual same-sex sexual activity is not a crime:** Consensual same-sex sexual activity between people who are above the age of consent should not be criminalised. The following offences, or any with similar effect, should be abolished: indecency (or gross indecency) between people of the same sex, unnatural acts, carnal knowledge/intercourse against the order of nature, buggery, sodomy, homosexuality, lesbianism, same-sex sexual relations, fellatio, and cunnilingus.

Some Commonwealth countries have repealed these offences through legislation. In others, local courts have found these offences to be unconstitutional, striking down the offending provisions in the criminal law. Both approaches are assessed in the country reports in Part C.

- b. No discriminatory, derogatory or stigmatising language is used: Sexual offences laws should not use language that is discriminatory, derogatory or stigmatising of LGBT+ people, including terms such as: buggery, sodomy, intercourse against the order of nature, indecency between male/female persons, abominable crime, or the equating of same-sex sexual activity with bestiality.
- c. No discriminatory age of consent laws where consensual same-sex sexual activity is not a crime: The age at which a person can legally consent to sexual activity should be the same for everyone regardless of the kind of sexual activity and whether it involves same-sex or opposite-sex participants.

Maintaining a higher age of consent for same-sex sexual activity after repeal of the associated criminal offences is discriminatory, does not achieve full decriminalisation and is not good practice.

Close-in-age defences and exceptions should be available to prevent criminalising children and young people who engage in genuinely consensual same-sex sexual activity with their peers when one or both of them is under the age of consent.

PART C: Country Checklists





The Africa region of the Commonwealth comprises 19 countries. A number of countries in the region have multiple legal systems including Sharia or Islamic law, which may include sexual offences. Applicable common law and case law may also be relevant. For the most part, these laws have not been assessed in this report as they are outside its scope.

One of the reasons for excluding these sources of law from the analysis was their limited accessibility. Also, it was decided to focus on statutory sexual offences law in the first instance, in order to prompt and assist legal reform processes. The report is not a comprehensive survey of all sexual offences laws in force in the Commonwealth countries of the region. It is intended to provide a snapshot view of whether certain key elements of sexual offences law in national leaislation meet good practice standards that are human rights compliant. It is hoped that the report will be a helpful starting point for the thorough analysis of all sexual offences laws that states will need to undertake as part of any law reform process. This would necessarily include analysis of parallel or complementary legal frameworks on sexual offences, including the common law, as well as customary or religious law, where these apply.

Some countries in the region have made significant reforms to the sexual offences laws inherited from the British colonial era, bringing them into line to varying degrees with international human rights and good practice standards. These include, for example, gender-neutral sexual assault laws (e.g. Seychelles), expressly criminalising rape in marriage (e.g. Namibia), criminalising all non-consensual sexual acts involving penetration (e.g. Eswatini) and including a wide range of child sexual assaults (e.g. South Africa). In this region, six countries no longer criminalise consensual same-sex sexual activity (Botswana, Lesotho, Mozambique, Rwanda, Seychelles and South Africa). Of the remaining countries, many provide lengthy terms of imprisonment for such activity.

However, as the checklists below demonstrate, t<u>here is still a substantial</u> gap between sexual offences laws in force in many countries and the good practice standards described in this report. These include allowing a defence of marriage to rape or an exemption for marital rape (e.g. Kenya), allowing the defence of consent to child sexual offences for children under 16 (e.g. Malawi) and criminalising consensual sexual activity with a person with disability (e.g. Botswana). Many countries do not define 'consent' to sexual activity to mean free and voluntary agreement or choice, and continue to use derogatory, stigmatising and moralistic terms in legislation, such as 'imbecile', 'idiot', 'defilement', 'unnatural acts', 'indecent assault' and 'buggery'. Malawi and Uganda provide for the death penalty for rape, contrary to good practice.

There is an urgent need for widespread and comprehensive reform of sexual offences laws in this region.

Although the penalties regime for sexual offences is not assessed in this report, all penalties need to be reviewed, along with any sentencing guidelines to judges, as part of any sexual offences law reform process. Good practice requires penalties to match the gravity of the crimes, provide for aggravating factors to be taken into account in sentencing, not be discriminatory, and exclude the death penalty and corporal punishment.

Implementation of sexual offences laws is also not assessed in this report. It is noted, however, that in many countries in the region, including some with reformed, good practice sexual offences laws, effective implementation of the law is a significant challenge due to a number of factors, including:

- lack of financial and human resources;
- geographical challenges;
- lack of training, including in gender sensitivity, among justice sector actors; and
- entrenched cultural and religious beliefs.

Every Commonwealth country in this region has ratified at least some of the regional and UN human rights treaties of most relevance to the subject matter of this report, namely the African Charter on Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, and Convention on the Rights of Persons with Disabilities. However, not every country has ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment or the International Covenant on Civil and Political Rights.

Every effort has been made to reflect accurately each country's laws based on legislation that was publicly available online or provided to the authors at the time of writing, and wherever possible, advice from legal experts in the countries covered in this report.





Botswana's sexual offences laws are contained in the *Penal Code Act 1964,* as amended by the *Penal Code (Amendment) Act 2005* (PC). The *Criminal Procedure and Evidence Act 1939* (CPEA) contains the rules of evidence which apply to sexual assault offences. The common law and relevant case law are not assessed in this report.

Although some sexual offences were revised in 2005, they do not adequately reflect good practice or human rights standards. In particular, rape excludes penetration by non-sexual organs, such as fingers, and marital rape is not an offence. There are child sexual assault offences however, they are comprehensive and exclude. not for example sexual grooming and sexual communication with a child. They are also weakened by not providing for close-in-age defences. Close-in-age defences or exceptions to child sexual assault are necessary to avoid criminalising young people and children who engage in consensual sexual activity with their peers. The leaislation also criminalises sexual intercourse with a woman who has an intellectual disability regardless of her capacity to freely consent and uses the derogatory terms 'imbecile' and 'idiot'.

The age of consent in Botswana is 16.

In June 2019, the Gaborone High Court struck down the *PC* provisions criminalising consensual same-sex sexual activity as unconstitutional. At the time of writing, this decision was under appeal by the government to the Court of Appeal, but had not been decided. All non-consensual sexual acts, including anal 'rape', should be expressly included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Botswana is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination aaainst Women. Convention on the Rights of the Child, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights. It has not joined the Convention on the Rights of Persons with Disabilities. Botswana is also a party to the African Charter on Human and Peoples' Rights, but has not joined the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

Comment: Offences are gender-neutral except for the offence of indecent assault of a boy under 14 (s 166 PC).

b Marital rape and sexual assault are crimes

Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.

c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

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d Evidence of resistance is not required

Comment: The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

Comment: The legislation specifies that penetration 'of a person' by a 'sexual organ' or 'instrument' constitutes rape, excluding penetration by body parts that are not sexual organs (s 141 PC). Other offences (e.g. 'indecent assault', s 146 PC) may cover these acts but this is not explicit in the legislation and they may be treated as less serious offences.

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: The legislation does not define 'indecent assault' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body (s 146 PC). Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

g No corroboration required

Comment: The legislation states that a person can be convicted 'on the single evidence of any competent and credible witness' (s 239 CPEA). Common law rules are not assessed.

h Prior sexual conduct is inadmissible and irrelevant Comment: Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic

Comment: The legislation uses the terms 'carnal knowledge', 'defilement', 'indecent assault' and 'insult the modesty' (ss 141, 146-147 PC).

Additional Criteria in Relation to Children

Meets Criteria: 🕑 Yes 😑 Partly 区 No ? Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences Comment: Child sexual assault offences are very limited (e.g. ss 146-147 PC) and do not include, e.g. sexual grooming, sexual communication with a child and sexual activity in front of a child. There are no close-in-age defences.
 b Child sexual assault offences are gender-neutral
 - Comment: Child sexual assault offences are gender-neutral except for the offence of the indecent assault of a boy under 14 (s 166 PC).
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

Comment: There is no defence of consent for 'defilement' of a child or 'indecent assault' of a child under 16 unless the child is the spouse (ss 146-147 PC). The exceptions for spouses mean that these provisions do not meet the criterion.

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence

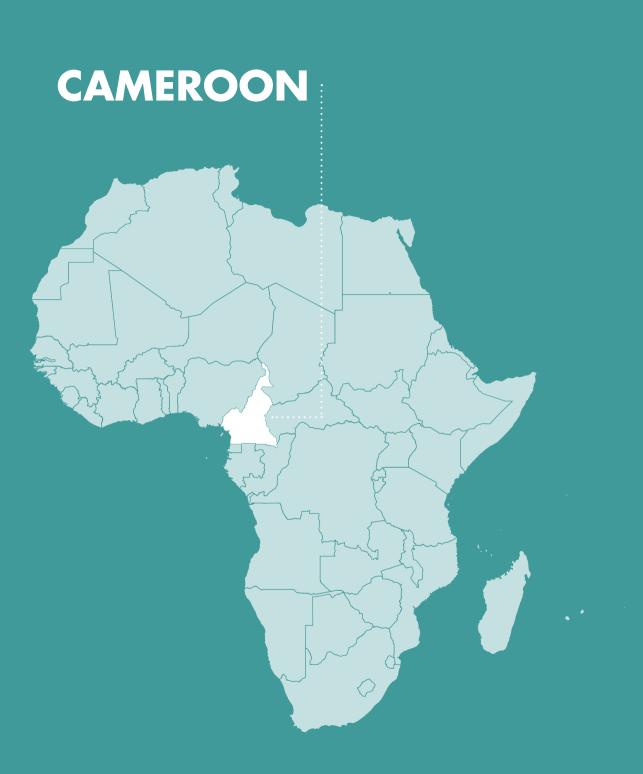
Comment: It is an offence to have sexual intercourse with a person who is an 'idiot' or an 'imbecile' regardless of consent (s 148 PC).

b No discriminatory, derogatory or stigmatising language is used Comment: The legislation uses the terms 'idiot' and 'imbecile' (s 148 PC).

4 Consensual Same-Sex Sexual Activity

Sa	me-sex sexual activity is not a crime	
a	Consensual same-sex sexual activity is not a crime Comment: The Gaborone High Court has found these offences to be unconstitutional. Although the government has appealed this decision, the PC provisions of 'carnal knowledge against the order of nature' and 'gross indecency' are null and void (ss 164, 167).	0
b	No discriminatory, derogatory or stigmatising language is used	0
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	0

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Cameroon's sexual offences laws are contained in the *Penal Code* 2016 (PC). The common law and relevant case law are not assessed in this report.

The *Penal Code* was revised in 2016 and now contains some important provisions on violence against women and girls, such as offences of forced marriage and genital mutilation, and explicitly stating that a person accused of rape cannot escape prosecution and conviction by subsequently marrying the victim. While they may meet good practice for sexual offences law, they are not assessed in this report.

Elements that do meet the good practice criteria applied below include sexual assault crimes that are gender-neutral, the criminalisation of marital rape and sexual assault, not providing a defence of consent to child sexual assaults and not criminalising consensual sexual activity with a person with disability regardless of freely given consent.

However, in many other respects, the law does not meet the good practice criteria. For example, 'rape' is limited to penile penetration and requires the use of 'force or moral ascendency'. The latter term is not a precise legal term and the requirement excludes the many ways in which rape can be committed without the use of force. There are no non-penetrative offences specified in the legislation, other than performing an indecent act in the presence of another person. Many forms of sexual assault, therefore, are not expressly criminalised under the legislation. There are some specific child sexual assault offences. however they are not comprehensive. They exclude, for example, sexual grooming and sexual communication with a child. The legislation does not provide close-in-age exceptions or defences to child sexual assault, necessary to avoid criminalising young people and children who engage in consensual sexual activity with their peers. The age of consent is 16 for opposite-sex sexual activity.

continues to criminalise Cameroon consensual same-sex sexual activity under the Penal Code. Criminalising consensual same-sex sexual activity has been held in court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the aeneral sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Cameroon is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights. It has signed but not ratified the Convention on the Rights of Persons with Disabilities. Cameroon is also a party to the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

b Marital rape and sexual assault are crimes

c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

d Evidence of resistance is not required

Comment: 'Rape' is sexual intercourse compelled by 'force or moral ascendency' (s 296 PC). The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

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e All non-consensual sexual acts involving penetration are offences

Comment: The legislation limits penetration to 'sexual intercourse' (s 296 PC). There are no offences in the legislation that expressly criminalise non-consensual sexual penetration by other body parts or objects or a vagina, or penetration by a penis or any other body part or object of other orifices. Other offences (e.g. 'indecent act, s 295 PC) may cover these acts, but this is not explicit in the legislation and they may be treated as less serious offences.

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: 'Indecent act in the presence of another person' is not defined to include all nonconsensual acts of sexual touching (e.g. groping) of any part of the body (s 295). Such acts may be covered but it is not explicit in the legislation.

Rules of evidence and procedure

g No corroboration required

Comment: Not expressly excluded in legislation. Common law rules are not assessed.

h Prior sexual conduct is inadmissible and irrelevant Comment: Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic Comment: The legislation uses the term 'indecent act' (ss 295, 346).

Additional Criteria in Relation to Children

Meets Criteria: 💙 Yes 😑 Partly 😣 No 🥐 Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences
 Comment: There are very limited child sexual assault offences (e.g. s 346) that do not include e.g. sexual grooming, sexual communication with a child, and sexual assault by a person in position of trust. There are no close-in-age defences.
 b Child sexual assault offences are gender-neutral
- c. There is no defence of consent to child sexual assault offences
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

3 Sexual Assault

Additional Criteria in Relation to People with Disability

 Sexual offences laws treat people with disability equally

 a
 Consensual sexual activity with a person who has a disability is not an offence

 b
 No discriminatory, derogatory or stigmatising language is used

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime		
a	Consensual same-sex sexual activity is not a crime Comment: 'Homosexuality', defined as sexual relations with a person of the same-sex, is an offence (s 347-1 PC).	×
b	No discriminatory, derogatory or stigmatising language is used	0
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	N/A



Eswatini's sexual offences laws are contained in the Sexual Offences and Domestic Violence Act 2018. The common law and relevant case law are not assessed in this report.

Eswatini enacted a new sexual offences law in 2018. Some sexual assault provisions covered by this review and the criteria below meet good practice standards. However, other areas require further reform, including repealing provisions that criminalise consensual same-sex sexual activity.

The laws meet the good practice standards in a number of ways: all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices are crimes; there are several specific child sexual offences; corroboration is not required for rape and other sexual assaults; and evidence of the past sexual conduct of the complainant is not admissible. The legislation does not criminalise consensual sexual relations with a person with disability. The age of consent is 18 years for opposite-sex sexual activity.

Areas of the law that do not meet good practice include the lack of close-in-age defences to child sexual assaults to prevent criminalising consensual sexual activity between young people. Sodomy is a common law offence. Criminalising consensual same-sex sexual activity has been held in court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Eswatini is a state party to relevant international and reaional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination aaainst Women. Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, Convention against Torture and Other Cruel. Inhuman or Dearadina Treatment or Punishment. and International Covenant on Civil and Political Rights. It is also a party to the African Charter on Human and Peoples' Riahts. It has signed but not ratified the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria



Definition and scope of the crimes		
a	Sexual assault crimes are gender-neutral	Ø
b	Marital rape and sexual assault are crimes	0
с	Free and voluntary consent is required Comment: There is no express definition of consent requiring free and voluntary consent to be given.	×
d	Evidence of resistance is not required Comment: 'Rape' requires coercion (threat of force or use of force) unless the person is incapacitated (s 3). There is no such requirement for 'sexual assault' (s 5). The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.	♥
е	All non-consensual sexual acts involving penetration are offences	0
f	All non-penetrative, non-consensual physical sexual acts are criminal offences Comment: Sexual assault is comprehensively defined (ss 2, 5).	0
Rul	es of evidence and procedure	
g	No corroboration required Comment: The legislation expressly excludes any requirement for corroboration (s 49).	0
h	Prior sexual conduct is inadmissible and irrelevant Comment: The legislation expressly states that evidence of prior sexual conduct is inadmissible (s 52).	0
Cri	mes of power and violence not morality	
i	Terminology in sexual assault laws is legal and not moralistic Comment: The legislation uses the term 'indecent treatment' (s 34).	0

Additional Criteria in Relation to Children

Meets Criteria: 🕑 Yes 😑 Partly 🗴 No ? Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences Comment: There are comprehensive child sexual assault offences (ss 3, 36-45).
- b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

3 Sexual Assault

Additional Criteria in Relation to People with Disability

 Sexual offences laws treat people with disability equally

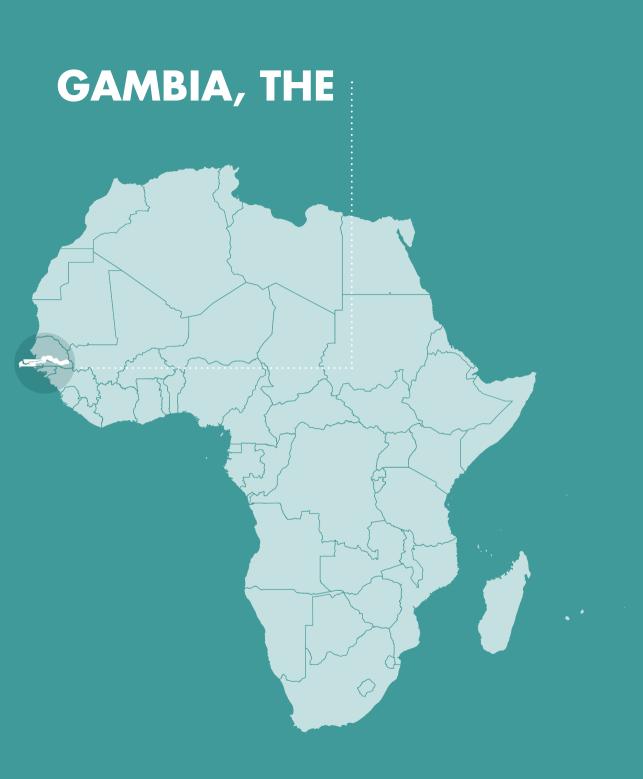
 a
 Consensual sexual activity with a person who has a disability is not an offence

 b
 No discriminatory, derogatory or stigmatising language is used

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime		
a	Consensual same-sex sexual activity is not a crime Comment: Sodomy is a common-law offence.	×
b	No discriminatory, derogatory or stigmatising language is used Comment: The common-law uses the term 'sodomy'.	×
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	N/A

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The Gambia's sexual offences laws are in the Criminal Code 1939 (CC), the Criminal Code Amendment Act 2014 (CCA) and the Evidence Act 1994 (EA). The Children's Act 2005 contains offences on the abduction and procurement of children but no sexual offences. The Women's Act 2010, was enacted to implement The Gambia's treaty obligations under **CEDAW** and the Maputo Protocol, but does not contain relevant sexual offences. The common law and relevant case law are not assessed in this report.

In particular, under the CC, rape is limited to penile penetration of the vagina ('carnal knowledge') and sexual offences are not aender-neutral. Child sexual assault offences are very limited and are weakened by a lack of close-in-age exceptions or defences. Close-in-age exceptions or defences are necessary to avoid criminalisina young people and children who engage in consensual sexual activity with their peers. The CC criminalises sexual intercourse with a woman who has an intellectual disability regardless of her ability to give free and voluntary consent and uses the derogatory terms 'imbecile' and 'idiot'.

positive Despite the move enacting the Women's of Act in 2010, The Gambia's sexual offences legislation as assessed in this report does reflect good practice not standards.

CC criminalises The consensual same-sex sexual activity, such as 'carnal knowledge against the order of nature' and 'gross indecency'. The CCA introduced an additional offence of 'aggravated homosexuality' which includes serial offenders and persons with HIV. and which carries life imprisonment. Criminalising same-sex sexual activity has been held in court decisions in other Commonwealth iurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional laws that criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

The Gambia is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All forms of Discrimination against Women. Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, Convention against Torture and Other Cruel, Inhuman or Dearadina Treatment or Punishment and International Covenant on Civil and Political Rights. It is also a party to the African Charter on Human and Peoples' Rights and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

Comment: 'Rape' is unlawful carnal knowledge by a person of a woman (s 121 CC). 'Indecent assault' is committed by a person against a woman or a girl (s 126 CC). Child sexual offences in the CC refer only to the carnal knowledge of a girl (e.g. s 127 CC).

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b Marital rape and sexual assault are crimes

Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.

Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

d Evidence of resistance is not required

Comment: The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

Comment: 'Rape' is unlawful carnal knowledge of a female (s 121 CC). There are no legislative offences that expressly criminalise non-consensual sexual penetration of all orifices by any body part or object. Other offences (e.g. 'indecent assault', s 126; 'unnatural offences', s 144 CC) may cover such acts, but this is not explicit in the legislation and they may be treated as less serious offences. Criminalising non-consensual sexual acts as 'unnatural' acts is also not good practice.

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: The legislation does not define 'indecent assault' (s 126 CC) to expressly criminalise all acts of non-consensual sexual touching (e.g. groping) of any part of the body. Such acts may be covered, but it is not explicit in the legislation and the provision only applies to assault of females.

Rules of evidence and procedure

g No corroboration required

Comment: Corroboration is expressly required (s 180(2) EA).

h Prior sexual conduct is inadmissible and irrelevant

Comment: Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic

Comment: Legislation uses the terms 'carnal knowledge', 'indecent assault', 'defilement' and 'insult the modesty' (ss 121, 126-127 CC).

Additional Criteria in Relation to Children

Meets Criteria: 🕑 Yes 😑 Partly 区 No ? Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences
 Comment: Offences in the CCA are limited to 'abduction and procurement of girls, which are not assessed in this report. The child sexual assault offences under the CC are very limited, exclude offences against boys between 14-16 years and some are inappropriate (e.g. ss 127, 146). There are no close-in-age defences.
 b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

Comment: There is no defence of consent for girls under 16 (s 126(2) CC). The legislation does not expressly exclude this defence for 'indecent assault of boys under 14 years' (s 146 CC).

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence

Comment: Unlawful carnal knowledge 'knowing a woman or a girl to be an idiot or an imbecile' regardless of consent in circumstances not amounting to rape is a misdemeanour (s 128 CC).

b No discriminatory, derogatory or stigmatising language is used Comment: The legislation uses the terms 'idiot' and 'imbecile' (s 128 CC).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

a Consensual same-sex sexual activity is not a crime

Comment: Committing or attempting to commit 'carnal knowledge against the order of nature' or 'gross indecency' are offences under the CC regardless of consent (ss 144 -147 CC). 'Aggravated homosexuality' is an offence carrying life imprisonment (s 144A CCA).

- b No discriminatory, derogatory or stigmatising language is used Comment: The legislation uses the terms 'carnal knowledge against the order of nature' and 'gross indecency' (ss 144-147 CC) and 'aggravated homosexuality' (s 144A CCA).
- c No discriminatory age of consent laws where same-sex sexual activity is not N/A a crime

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Ghana's sexual offences laws are in the *Criminal Code 1960* (CC) as amended. The *Evidence Act 1975* (EA) contains the rules of evidence which apply to sexual assault offences. The common law and relevant case law are not assessed in this report.

In relation to the specific provisions assessed in this report, very few elements of the sexual offences provisions in the CC meet good practice and human rights standards. For the most part, the CC does not conform to those standards. For example, the CC criminalises consensual same-sex sexual activity as 'unnatural carnal knowledge' and does so in the same provision as the offence of bestiality. Criminalisina consensual same-sex sexual activity has been held in court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobaao, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all nonconsensual sexual acts. includina anal 'rape', should be included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

In relation to the sexual assault provisions, 'rape' is limited to penile penetration of a vagina, and there is only one child sexual assault offence with no close-in-age exception or child sexual assaults. defence to Close-in-age defences are necessary for good practice sexual offences laws. They avoid criminalising young people and children who engage in consensual sexual activity with their peers. The legislation also criminalises sexual intercourse with a woman who has an intellectual disability regardless of capacity to give free consent, using the derogatory terms 'imbecile' and 'idiot'.

The age of consent is 16 for opposite-sex sexual activity.

Ghana is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Women. aaainst Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, Convention against Torture and Other Cruel. Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights. It is also a party to the African Charter on Human and Peoples' Rights and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🛿 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

Comment: Sexual offences are gender-neutral except for rape which is 'carnal knowledge of a female' (s 98 CC).

b Marital rape and sexual assault are crimes

Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.

c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

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d Evidence of resistance is not required

Comment: The legislation does not state that evidence of resistance to an assault, such as physical injury, is not required to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

Comment: 'Rape' is limited to penile penetration of a female above the age of 16 years ('carnal knowledge of a female'). There are no legislative offences that expressly criminalise non-consensual sexual penetration by other body parts or objects of other orifices. 'Indecent assault' (and possibly other offences) may cover these acts, but this is not explicit in the legislation and it is a less serious offence (misdemeanour with minimum penalty of 6 months, compared to rape – a felony with a penalty of 5-25 years).

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: The legislation defines 'indecent assault' as 'forcibly making any sexual bodily contact' or sexually violating the body of another person not amounting to carnal knowledge (s 103 CC).

Rules of evidence and procedure

g No corroboration required

Comment: Corroboration is not required, however a court or any party may comment 'on the danger of acting on uncorroborated evidence' (s 7 EA).

h Prior sexual conduct is inadmissible and irrelevant Comment: Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic

Comment: The legislation uses the terms 'carnal knowledge', 'indecent assault' and 'defilement' (ss 98, 101, 103 CC).

Additional Criteria in Relation to Children

Meets Criteria: 💙 Yes 😑 Partly 😢 No 🥐 Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences
 Comment: There is only one child sexual assault offence in the CC 'defilement of a child under 16' (s 101 CC). This excludes many forms of child sexual assault that should be expressly criminalised (e.g. sexual grooming, sexual communication with a child, and sexual activity in front of a child). There are no close-in-age defences.
 b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence

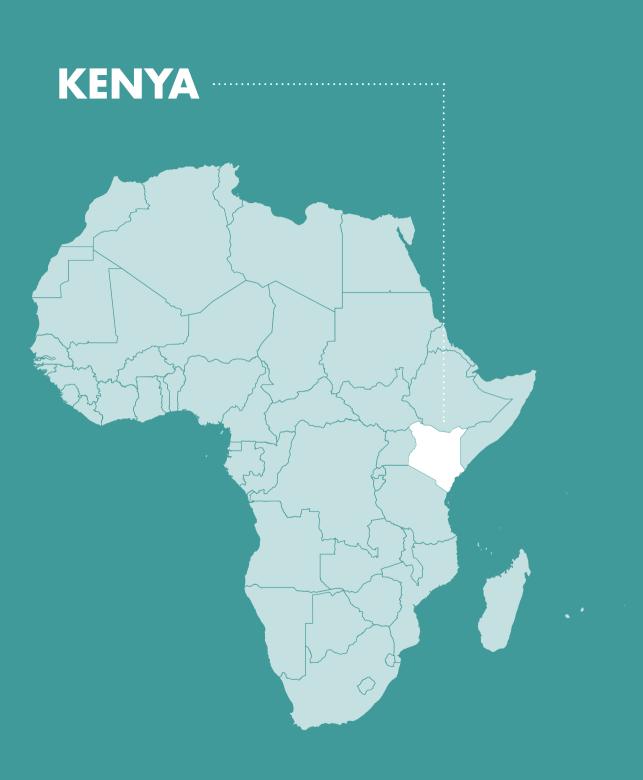
Comment: 'Carnal knowledge' or 'unnatural carnal knowledge knowing the person is an idiot, imbecile or a mental patient in or under the care of a mental hospital whether with or without his or her consent' is an offence (s 102 CC).

b No discriminatory, derogatory or stigmatising language is used Comment: The legislation uses the terms 'idiot' and 'imbecile' (s 102 CC).

4 Consensual Same-Sex Sexual Activity

Sai	me-sex sexual activity is not a crime	
a	Consensual same-sex sexual activity is not a crime Comment: It is an offence (misdemeanour) to have 'unnatural carnal knowledge' with a person over 16' (s 104 CC), whether consensual or not. 'Unnatural carnal knowledge' is defined to include bestiality (s 104(2) CC).	×
b	No discriminatory, derogatory or stigmatising language is used Comment: The legislation uses the term 'unnatural carnal knowledge' and treats it in the same manner as bestiality (s 104 CC).	×
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	N/A

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Kenya's sexual offences laws are in the Penal Code (PC) and the Sexual Offences Act 2006 (SOA). The Evidence Act (as amended) (EA) contains the evidentiary rules for all criminal offences, including sexual offences. The common law and relevant case law are not assessed in this report.

In 2006, major reforms were made to sexual offences by the SOA, introducing a number of positive changes. Many of these are not assessed in this report, but include important procedural safeguards for complainants, allowing evidence of the impact of the crime to be considered in sentencing, treating the abuse of a position of trust or authority to commit sexual assault as an aggravating factor in sentencing, and introducing a range of offences of sexual exploitation of children. Several positive reforms that are assessed in this report were also made by the SOA. including adopting a good practice definition of 'consent' and criminalising non-consensual sexual penetration by any body part and by objects. The age of consent to sexual activity is 18 years for both boys and girls engaged in opposite-sex sexual activity.

However, other areas of sexual offences laws assessed in this report do not meet good practice standards and are not human rights compliant. For example, Kenya criminalises consensual same-sex sexual activity between men under the *PC*. Criminalising this activity has been held in court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Further, many of the sexual assault provisions do not meet good practice. For example, rape and sexual assault in marriage are not expressly criminalised and the law does not specify that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. The PC criminalises consensual sexual activity with an intellectually disabled person, regardless of consent and uses derogatory terms such as 'idiots and imbeciles' to refer to such persons. There are no specific close-in-age defences to protect young people from being prosecuted for consensual sexual activity with their peers.

Kenya is a state party to some relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of **Discrimination** Women. aaainst Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities and International Covenant on Civil and Political Riahts. It has not joined the Convention against Torture and Other Cruel. Inhuman or Degrading Treatment or Punishment. Kenya is also a party to the African Charter on Human and Peoples' Riahts and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

b Marital rape and sexual assault are crimes

Comment: The SOA expressly exempts marital rape. It is unclear if it exempts other sexual assaults between married persons. (s 43 (5)).

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c Free and voluntary consent is required

Comment: 'Consent' is defined as 'she or he agrees by choice and has the freedom and capacity to make that choice' (s 42 SOA). The law provides that in certain circumstances and conditions there can be no consent (presumption of no consent) (ss 43-45 SOA).

d Evidence of resistance is not required

Comment: Although consent requires free choice and corroboration is not required (see below), the legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not state that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Rules of evidence and procedure

g No corroboration required

Comment: The EA states that the corroboration rule does not apply in cases of sexual assault if the only evidence is given by the complainant and the court is satisfied that they are 'telling the truth' (s 124).

h Prior sexual conduct is inadmissible and irrelevant

Comment: This evidence is excluded except by order of the court, in a narrow set of circumstances providing adequate safeguards (s 34 SOA).

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic

Comment: The SOA uses the terms 'indecent acts' (ss 2, 6-7, 11) and 'defilement' (s 8). The PC uses 'defilement', 'idiots and imbeciles' and 'improper purpose' (e.g. ss 146, 151).

Additional Criteria in Relation to Children

Meets Criteria: 💙 Yes 😑 Partly 😣 No 🥐 Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences Comment: There are specific child sexual assault offences (ss 5-9, 11-12, 14-16). There are no close-in-age defences for young people. Given that the SOA provides for an age of consent of 18 years, at the higher recommended end, failing to provide appropriate close-inage defences is particularly problematic.
 b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence

Comment: 'Carnal connection' with 'idiots and imbeciles' in circumstances not amounting to rape is an offence, regardless of consent (s 146, PC).

b No discriminatory, derogatory or stigmatising language is used Comment: The expressions 'defilement', 'carnal connection' and 'idiots and imbeciles' are used (e.g. s 146 PC).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime		
a	Consensual same-sex sexual activity is not a crime Comment: The Penal Code criminalises having, permitting or attempting 'carnal knowledge of any person against the order of nature' and 'indecent practices between males' (ss 162- 163, 165 PC).	×
b	No discriminatory, derogatory or stigmatising language is used Comment: The terms 'carnal knowledge against the order of nature' and 'gross indecency' are used (ss 162-165 PC).	×
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	N/A

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Lesotho's sexual offences laws are in the Sexual Offences Act 2003 (SOA) and the Penal Code Act 2012 (PCA). The Criminal Procedure and Evidence Act 1981 (CPEA) as amended, contains rules applicable to the prosecution of sexual offences. The common law and relevant case law are not assessed in this report.

Several important provisions of the *SOA* assessed in this report meet good practice standards. For example, the *SOA* criminalises all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices. Consensual same-sex sexual activity is not a crime. There is a good range of child sexual assault offences and consensual sexual activity with a person with a disability is not a crime. Lesotho has also legislated against the requirement for corroboration in sexual offences cases.

The age of consent is 18 years.

However, there are some exceptions for marital sexual assault and rape, contrary to human rights compliant good practice standards. Also, the past sexual history of a complainant of sexual assault is admissible to show a complainant was not a virgin before the sexual act. Allowing sexual reputation evidence for this purpose is inconsistent with good practice. The sexual offences provisions in the SOA and the PC appear inconsistent in places. Consolidating the two pieces of legislation would clarify the law.

Lesotho is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and International Covenant on Civil and Political Rights. It is also a party to the African Charter on Human and Peoples' Rights and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

b Marital rape and sexual assault are crimes

Comment: Marital rape and sexual assault are only crimes in limited circumstances. 'Unlawful sexual act' is a crime in marriage or other relationship only if violence or threat of violence is used, the person is sick, the offender has HIV, there is a judicial order of restraint, the parties are separated or the offender has deserted his spouse (s 3 SOA; s 52 PCA).

Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

d Evidence of resistance is not required

Comment: The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: The SOA and the PCA include a range of non-consensual physical sexual acts as crimes (s 3 SOA; s 51 PCA). However, it is not explicit in the legislation that all non-consensual sexual acts are included.

Rules of evidence and procedure

g No corroboration required

Comment: The CPEA states that any person can be convicted of any offence on the single evidence of any competent and credible witness (s 238(2)). The SOA abolishes the cautionary rule, meaning that the court can convict a person for sexual assault on the single evidence of the complainant (s 18 SOA).

h Prior sexual conduct is inadmissible and irrelevant

Comment: The legislation expressly states that prior sexual conduct is not admissible unless the court determines it is relevant. There is a list of possible situations when such evidence may be admissible, including to show a complainant was not a virgin before the sexual act that is the subject of the complaint. Such evidence is irrelevant and perpetuates the false myth that 'chaste' women cannot be sexually assaulted (ss 26-27 SOA).

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic Comment: The PC uses the terms 'indecent assault' and 'virgin' (s 51 PC). ~

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Additional Criteria in Relation to Children

Meets Criteria: 🕑 Yes 😑 Partly 🗴 No ? Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences
- b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence

Comment: A sexual act is unlawful if the complainant is affected by a physical, intellectual or mental disability, whether permanent or temporary that deprives them 'of the opportunity to communicate unwillingness to submit to or to commit the sexual act' (s 52 PC) or which makes them incapable of understanding the nature of the act (s 2 SOA). Good practice legislation is disability-neutral, applying the same consent regime for all.

b No discriminatory, derogatory or stigmatising language is used

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime a Consensual same-sex sexual activity is not a crime b No discriminatory, derogatory or stigmatising language is used c No discriminatory age of consent laws where same-sex sexual activity is not a crime



Malawi's sexual offences laws are in the Penal Code 1930 (PC), the Penal Code Amendment Act 2011 (PCA) and the Marriage, Divorce and Family Act 2015 (MDFA). The common law and relevant case law are not assessed in this report.

In 2006, Malawi enacted the Prevention of Domestic Violence Act and in 2013. the Gender Equality Act. However, it did not complement these important reforms with much-needed amendments to the sexual offences provisions in the PC. Most of the PC provisions assessed in this report do not meet good practice standards. For example, rape is limited to penile penetration of the vagina ('unlawful carnal knowledge'). Other sexual assault offences are not aender-neutral. Rape and sexual assault in marriage is a crime only in very limited circumstances.

There are some specific child sexual assault offences, but these are not comprehensive. The age of consent is 16 years for girls. However, it is 14 years for boys, which is too low. Good practice for sexual offences law requires that the age of consent be the same for every person regardless of sex and that it not be set too low. The child sexual assault offences are also weakened by a failure to provide appropriate close-in-age exceptions or defences, which necessary are to avoid criminalising young people and children who engage in consensual sexual activity with their peers. The legislation criminalises sexual intercourse with a woman who has an intellectual disability regardless of consent, using the derogatory terms 'imbecile' and 'idiot' to describe her. Malawi maintains the death penalty for rape which is contrary to good practice even though it has never been applied.

The Penal Code criminalises consensual same-sex sexual activity, such as 'indecent practices' between males and 'aross indecency' between females. The latter offence was introduced into the Penal Code in the latest amendments made in 2011. Criminalising same-sex sexual activity has been held in court decisions in other Commonwealth iurisdictions, such as Belize, Botswana, and Trinidad and Tobaao. India unconstitutional. Laws that to be criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Malawi is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination aaainst Women, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights. It is also a party to the African Charter on Human and Peoples' Rights and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

Comment: Sexual offences are not gender-neutral. Rape is unlawful carnal knowledge by a person of a woman or girl (s 132 PC). Indecent assault is committed by a person against a woman or a girl (s 137 PC). Child sexual offences refer to the carnal knowledge of a girl under 13 and indecent assault of a boy under 14 (ss 138, 155 PC).

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b Marital rape and sexual assault are crimes

Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.

The MDFA expressly states that marital rape is a crime if there is a decree for judicial separation (s 62 MDFA).

c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

d Evidence of resistance is not required

Comment: The legislation does not make clear that evidence of resistance to the assault, such as physical injuries to the body, is not required to prove that sexual activity took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

Comment: 'Rape' is limited to penile penetration of a vagina ('unlawful carnal knowledge'). There are no other offences that expressly criminalise non-consensual sexual penetration by all body parts or objects of other orifices (anus, mouth). Other offences (e.g. indecent assault) may cover such acts, but this is not explicit in the legislation.

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: Offences of 'indecent assault' and 'insulting modesty' apply only to women and are not defined in the legislation to include all acts of sexual touching (e.g. through clothes or with semen) of any part of the body. Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

g No corroboration required

Comment: Not expressly excluded in legislation. Common law rules are not assessed.

h Prior sexual conduct is inadmissible and irrelevant

Comment: Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic

Comment: Legislation uses the terms 'carnal knowledge', 'indecent assault', 'defilement' and 'insult the modesty' (ss 132, 138 PC).

Additional Criteria in Relation to Children

Meets Criteria: 🕑 Yes 😑 Partly 🗴 No ? Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences

Comment: The child sexual assault offences are very limited and some are inappropriate (e.g. do not cover sexual grooming, sexual communication with a child, sexual assault by a person in a position of trust), the low age of consent for boys means there are no offences for boys over 13, and there are no close-in-age defences (ss 137-138, 155 PC).

b Child sexual assault offences are gender-neutral

Comment: The child sexual offences are not gender-neutral. For example, 'carnal knowledge of a girl under 16' and 'indecent assault of a boy under 14' (ss 138, 155 PC).

c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

Comment: There is no defence of consent for boys under the age of 14 and girls under 16. This means that boys as young as 14-16 are treated as if they have the capacity to choose to give free and voluntary consent to engage in sexual activity with adults, including adults that are much older than them. The age of consent for boys is too low and is discriminatory. Malawi also allows an exception to the age of consent for married girls. Girls can be married at 15 years.

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence Comment: Unlawful carnal knowledge 'knowing a woman or a girl to be an idiot or an imbecile' regardless of consent in circumstances not amounting to rape is a crime (s 139 PC).
- **b** No discriminatory, derogatory or stigmatising language is used Comment: The legislation uses the terms 'idiot' and 'imbecile' (s 139 PC).

4 Consensual Same-Sex Sexual Activity



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Mauritian criminal law is derived from the French Penal Code and British common law, particularly on criminal procedure and evidence. Sexual offences are found in the Criminal Code 1848, as amended. The common law and relevant case law are not assessed in this report. The Child Protection Act 1995 (CPA) contains some child sexual offences, one of which is relevant to this report.

The *CC* is, in many respects, outdated and does not reflect good practice. In 2007, the government prepared a *Sexual Offences Bill* to update these provisions, but it had not been enacted at the time of writing. The government has since stated it is committed to updating the *CC* and criminal procedural rules to reflect developments in the Commonwealth, and authorised the Mauritian Law Reform Commission to develop amendments in these areas.

The Mauritian Law Reform Commission has made numerous recommendations. at least since 2007 and again in April 2019, for the reform of the sexual offences provisions in the CC. For example, in 2007 it recommended that consensual acts of 'sodomy' committed in private by adults be decriminalised in accordance with international human rights standards (Issue Paper: Commentary on some of the Human Rights dimensions of the Sexual Offences Bill No. VI of 2007, June 2007). In 2016 it made further recommendations and in 2019 it presented draft provisions to replace the existing law. Many of their proposed reforms cover areas of sexual offences laws considered in this report.

These include a new definition of rape that includes penetration, however slight, of all orifices by any object or body part by a man or woman, the explicit criminalisation of marital rape, a new offence of sexual assault, with aggravating factors for both rape and sexual assault, as well as new offences of sexual assault without violence on minors under the age of 16 and 18.

While reforms to these aspects of Mauritian sexual offences law are necessary, it is critical that all reforms meet good practice standards. For example, the reforms should make explicit that there is no requirement to demonstrate resistance or use of force to prove there was no consent to sexual activity.

All sexual offences involving young people should be genderneutral and have appropriate close-in-age defences to prevent criminalising consensual sexual activity between young people and their peers.

There should also be a wide range of sexual offences involving children, including for example grooming for sexual purposes. The provisions criminalising consensual sexual activity with a person with an intellectual disability should be reformed to ensure they only apply to n<u>on-consensual</u> acts and do not use discriminatory or derogatory language. Marital rape must be expressly criminalised and article 242 of the Code, which provides an excuse for manslaughter when a wife and another person are caught

in the act of adultery, repealed. Good practice rules of evidence and court procedure are also key parts of ensuring both fair trials and that victims are not discriminated against or re-traumatised. Rules requiring corroboration in sexual offences cases and permitting evidence of prior sexual history of victims should be excluded.

Criminalising same-sex sexual activity has been held in court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the general sexual assaults provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Mauritius is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of all Forms of Discrimination against Women. Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Riahts. Mauritius is also a state party to the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol).

Mauritius continues to criminalise consensual same-sex sexual activity.



Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

Comment: The Criminal Code criminalises rape (not defined). Only indecency offences are gender-neutral (e.g. 'grossly indecent act' in public, 'attentat à la pudeur', 'illegal sexual intercourse', 'indecent acts in public', arts 248-249).

b Marital rape and sexual assault are crimes

Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.

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The Code provides an excuse for manslaughter when a wife and another person are caught in 'the act of adultery' (art 242). Note the Protection from Domestic Violence (Amendment) Act 2016 defines 'domestic violence' to include sexual violence by a spouse (s 2).

c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

d Evidence of resistance is not required

Comment: The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

Comment: The legislation does not expressly cover all acts of penetration by all body parts and objects of all orifices. Other offences may cover these acts but this is not explicit in the legislation and they may be treated as less serious offences.

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: The legislation does not expressly cover all acts of touching and groping. It contains outmoded 'indecency crimes' which may cover some of these acts, but this is not explicit in the legislation.

Rules of evidence and procedure

g No corroboration required

Comment: Not expressly excluded in legislation. Common law rules are not assessed.

h Prior sexual conduct is inadmissible and irrelevant

Comment: Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic

Comment: The Code refers to 'indecent act attentat à la pudeur', 'indecent acts in public', 'chastity', 'debauch' (arts 248, 249, 251).

Additional Criteria in Relation to Children

Meets Criteria: 💙 Yes 😑 Partly 😣 No 🥐 Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences

Comment: Child sexual assault offences under the CC are very limited (e.g. arts 249(4), 250(2)) and do not include e.g. sexual grooming, sexual communication with a child, sexual activity in front of a child. The offence of sexual abuse of a child (s 14 CPA) may cover these offences, but this is not explicit in the legislation. It covers any act of a sexual nature with a child committed for specified purposes, including exploitation of any kind. They do not provide for close-in-age defences.

- b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence Comment: It is an offence to have sex with a person with an intellectual disability, 'a mentally handicapped person', regardless of consent (e.g. Art 249 (4) &(5)(c), 250 (2)).
- b No discriminatory, derogatory or stigmatising language is used

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime			
a	Consensual same-sex sexual activity is not a crime Comment: Sodomy is a crime (art 250) and other indecency provisions apply.	×	
b	No discriminatory, derogatory or stigmatising language is used Comment: The Code refers to indecent act attentat à la pudeur', 'indecent acts in public', 'chastity', 'debauchery and corruption of youth' and 'sodomy' (arts 248-251).	×	
с	No discriminatory age of consent laws where same-sex sexual activity is not	N/A	

 No discriminatory age of consent laws where same-sex sexual activity is not N/A a crime

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Mozambique's criminal law on sexual offences derives from colonial-era Portuquese penal law. Sexual offences are set out in the Penal Code (No 35/214), as amended (PC). The Law on Domestic Violence Against Women of 2009 (No 29/2009) criminalises a range of violent assaults in marriage, Mozambiaue includina rape. has other laws related to sexual offences, including the Law for the Promotion and Protection of the Rights of the Child (No 7/2008), and the Law for the Prevention and Combat of Traffickina in Persons, Especially Women and Children (No 6 of 2008). However, these laws do not contain sexual offences that are assessed in this report. The Criminal Procedure Code (No 16489 of 15 February 1929) (CPC) applies to sexual offences. The common law and relevant case law are not assessed in this report.

In 2014, Mozambique reformed the sexual offences provisions of the PC. introducing important reforms such as decriminalising consensual activity same-sex sexual and criminalising marital rape. A review of the PC that commenced at the time of the 2014-15 reforms recommended additional changes, but at the time of writing, no further reforms had been made. The CPC was not part of this review and has not been amended.

Despite the significant 2014 reforms, the amended *PC* does not meet good practice in a number of respects assessed in this report. For example, the crime of rape and the crime of "atentado ao pudor" ("attack or assault against modesty") do not explicitly cover all acts of non-consensual penetration by all parts of the body or objects or all acts of sexual touching. Further, the offence of atentado ao pudor must be accompanied by violence, which excludes many sexual assaults committed without violence. such those involvina threats or other coercion, or where the person is incapable of giving genuine consent, such as intoxication or unconsciousness. and other cases where there is a clear lack of consent

Further reform of the PC is necessary to make explicit that rape and sexual assault can occur without the use of force or violence and that evidence of resistance or submission is not required to prove there was no consent. It should also explicitly provide for the criminalisation of all non-consensual acts of sexual penetration and touching by all body parts and objects, and repeal the requirement for violence.

While all child sexual offences are genderneutral, they are not comprehensive. For example, grooming for sexual purposes is not expressly criminalised. Further, the *PC* provides for a serious penalty of 20-24 years for rape of children under 12, whereas rape of a child over 12 years carries the same penalty as rape of an adult, which is much lower (2-8 years). Mozambique does not provide close-in-age defences, which are essential for good practice sexual offences law to prevent criminalising consensual sexual activity between young people and their peers.

The age of consent, at 16 years, is the same for everyone.

Mozambique is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination aaainst Women. Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights. Mozambique is also a state party to the African Charter on Human and Peoples' Rights and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).



Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

b Marital rape and sexual assault are crimes

c Free and voluntary consent is required

Comment: The legislation does not include an express definition of consent requiring free and voluntary consent to be given. It also limits sexual assault to cases where there is violence, except for assaults on persons under 16.

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d Evidence of resistance is not required

Comment: The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

Comment: Rape is limited to penile penetration of vagina and anus. Penetration by other body parts and objects may be covered by the offence of "atentado ao pudor" – "attack or assault against modesty" – but only if accompanied by violence. The PC does not specify that all these acts are covered (art 221). Other offences may cover them, but this is not explicit in the legislation and they may be treated less seriously.

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: 'Indecent assault' (atentado ao pudor - attack or assault against modesty) is defined as an act of 'violence' against the victim so that the perpetrator satisfies his or her 'carnal passions' or for 'another reason' (art 221). Other offences may cover them, but this is not explicit in the legislation and they may be treated less seriously.

Rules of evidence and procedure

g No corroboration required

h Prior sexual conduct is inadmissible and irrelevant

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic Comment: The PC uses the terms 'modesty', (e.g. 'atentado ao pudor, art 221). Art 218 refers to fraud not constituting 'seduction'.

Additional Criteria in Relation to Children

Meets Criteria: 💙 Yes 😑 Partly 区 No ? Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences Comment: Child sexual assault provisions are very limited (e.g. arts. 219-222, 226, 228), and do not include grooming for example. Rape of children from the age of 12 years are covered by the general rape offence. There are no close-in-age defences.
 b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than

3 Sexual Assault

close-in-age defences)

Additional Criteria in Relation to People with Disability

 Sexual offences laws treat people with disability equally

 a
 Consensual sexual activity with a person who has a disability is not an offence

 b
 No discriminatory, derogatory or stigmatising language is used

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime			
a	Consensual same-sex sexual activity is not a crime	Ø	
b	No discriminatory, derogatory or stigmatising language is used	Ø	
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	Ø	



Namibia's sexual offences laws are in the Combating of Rape Act 2000 (CRA), the Combating of Immoral Purposes Act 1980 (IPA) and the Children Care and Protection Act 2015 (CCPA). The Criminal Procedure Act 2004 (CPA) contains the rules relevant to evidence in sexual offences cases. Namibia does not have a penal or criminal code, as the criminal law is uncodified. Some sexual offences are common law offences, including the offence of sodomy. The common law and relevant case law are not assessed in this report.

Some of the provisions covered by this review and the criteria below meet good practice standards. For example, the *CRA* contains a comprehensive gender-neutral definition of rape including all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices. However, coercion is required unless the complainant is incapacitated, which is not good practice. Marital rape is explicitly criminalised. The *CPA* expressly states that corroboration is not required for any offence and that the prior sexual history of a sexual assault complainant is inadmissible.

However, not all non-consensual physical sexual acts are criminalised. The common law offence of indecent assault is limited to physically touching the genitals or other private parts of another person's body. Further, there is only one child sexual assault offence in the *IPA* – 'carnal knowledge of a child under 16'. The *CCPA* includes only limited offences related to sexual acts, for example, exploitation of children for the creation of pornography. Child pornography offences are not assessed in this report. The *IPA* also

criminalises sexual intercourse with a woman who has an intellectual disability, regardless of her capacity to freely and voluntarily consent. It also uses the derogatory terms 'imbecile' and 'idiot'.

In Namibia, sodomy and the crime of 'unnatural sexual offences', which includes other forms of sexual activity between men. are criminal offences under the common law inherited from South African (and formerly British and German) rule. Criminalising same-sex sexual activity has been held in court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. The common law offence of 'indecent assault' has been applied by the courts in Namibia to non-consensual heterosexual and homosexual anal intercourse. However, laws that criminalise consensual samesex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the aeneral sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be aender-neutral.

Namibia is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights. Namibia is also a party to the African Charter on Human and Peoples' Rights and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

Comment: Sexual offences are gender-neutral except for 'carnal intercourse' or an 'immoral act with a female who is an idiot or an imbecile' and the use of a drug for sexual purposes with a female under 18 (ss 15-16 IPA).

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b Marital rape and sexual assault are crimes

Comment: The legislation specifies that marriage or other relationship is not a defence to a charge of rape (s 2 CRA).

c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

d Evidence of resistance is not required

Comment: The legislation does not make clear that evidence of resistance to the assault, such as physical injuries to the body, is not required to prove that sexual activity took place without consent. It also does not specify that consent cannot be inferred from a complainant's silence or submission during the assault.

Note that 'rape' requires coercion (threat of force or force) unless the person is incapacitated (s 2 CRA).

e All non-consensual sexual acts involving penetration are offences

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: The legislation does not contain sexual assault offences other than rape. Namibia applies the common law offence of 'indecent assault'. Common law offences are not assessed and this offence may not cover all acts of non-consensual sexual touching (e.g. touching any body part with genitals). Legislating a comprehensive offence of non-penetrative sexual assault is necessary for good practice.

Rules of evidence and procedure

g No corroboration required

h Prior sexual conduct is inadmissible and irrelevant

Comment: The CPA expressly excludes evidence of the sexual reputation of the complainant. The judge has a discretion to admit other evidence relating to a person's sexual conduct or experience if it has significant probative value but without other safeguards (e.g. prejudice to the complainant) (s 258 CPA).

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic Comment: Common law uses the term 'indecent assault'.

Additional Criteria in Relation to Children

Meets Criteria: 💙 Yes 😑 Partly 😢 No 🥐 Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences Comment: There is only one child sexual assault offence in the IPA – 'sexual act with a child under 16' (s 14). Although 'sexual act' is broadly defined, there are no specific offences, for example, of sexual communication with a child or grooming. There are no close-in-age defences.
- b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence Comment: Carnal intercourse when the person 'knew such female was an idiot or imbecile' regardless of consent is an offence (s 15 IMP).
- b No discriminatory, derogatory or stigmatising language is used Comment: The legislation uses the terms 'idiot' and 'imbecile' (s 15 IMP).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime		
a	Consensual same-sex sexual activity is not a crime Comment: Sodomy between men and 'unnatural' sexual acts are offences in the common law.	×
b	No discriminatory, derogatory or stigmatising language is used Comment: The common law uses the terms 'sodomy' and 'unnatural sexual offences'.	×
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	N/A

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Nigeria, a federation comprising 36 states, has multiple legislative frameworks for sexual offences. The southern 17 states are governed by the provisions of the Criminal Code Act 1990 (CCA). The Federal Capital Territory (FCT) is governed by the Violence against Persons Prohibition Act 2015 (VAPPA). The Penal Code 1960 (PC) governs the 19 northern states. In some areas assessed in this report, these laws are similar. Where there are differences, these are noted in the checklist below. The Same-Sex Marriage Prohibition Act 2013 (SSMPA), a federal law that applies nationally, contains an offence that criminalises any public display 'of same-sex amorous relationship directly or indirectly'. The Child Rights Act 2003 (CRA), which has been adopted by 23 of Nigeria's 36 states, contains the single child sexual assault offence of 'unlawful sexual intercourse with a child'. The Evidence Act 1990 contains the rules of evidence relevant for sexual offences in all parts of the country. Although individual states have the power to enact their own criminal law and some have done so, including the twelve states that practice sharia law, they are not included in this review. The common law and relevant case law are also not assessed in this report.

Despite some positive reforms in the CRA and the VAPPA, Nigeria's sexual offences laws do not meet many of the good practice criteria applied in this report.

offences For example. sexual in the CC and the PC are not gender-neutral. There are some specific child sexual assault offences in the CCA, the PC and the CRA, but they are not comprehensive. Nigeria does not provide close-in-age exceptions any legislation. or defences Close-in-age defences are necessary to avoid criminalising young people and children who engage in consensual sexual activity with their peers. The CCA criminalises sexual intercourse with a woman who has an intellectual disability, using the derogatory terms 'imbecile' and 'idiot' to describe her. The age of consent to opposite-sex sexual activity is 16 under the CC and the PC, and 18 under the CRA.

Unlike the CCA and PC, in the Federal Capital Territory the VAPPA has an expansive definition of rape to include all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices. Rape is limited in the CCA and PC to penile penetration of the vagina.

Consensual same-sex sexual activity is a crime throughout Nigeria. These offences should be repealed. Criminalising same-sex sexual activity has been held in court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. All non-consensual sexual acts, including anal 'rape', should be included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Nigeria is a state party to relevant international and regional human treaties. including rights the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities. Convention against Torture and Other Cruel. Inhuman or Degrading Treatment Punishment, and International or Covenant on Civil and Political Rights. It is also a party to the African Charter on Human and Peoples' Rights and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).



Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

Southern states

Comment: 'Rape' is limited to 'unlawful carnal knowledge by a person of a woman or girl' (s 357 CCA). 'Indecent assault' is committed by a person against a woman or a girl (s 360 CCA). Child sexual offences refer to the 'carnal knowledge of a girl under 13', 13-15, and indecent assault of a boy under 14, and girl under 16 (ss 138, 216, 218, 221, 222 CCA).

Northern states

Comment: Rape under the PC is limited to sexual intercourse with a woman without consent (s 282 PC).

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Federal Capital Territory

b Marital rape and sexual assault are crimes Southern states

Comment: The CC does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance (ss 6, 218, 222, 357) (e.g. 'unlawful carnal knowledge' is carnal knowledge 'otherwise than between a husband and wife', s 6).

Northern states

Comment: The PC states 'sexual intercourse by a man with his own wife is not rape 'if she has attained to puberty' (s 282(2) PC).

Federal Capital Territory

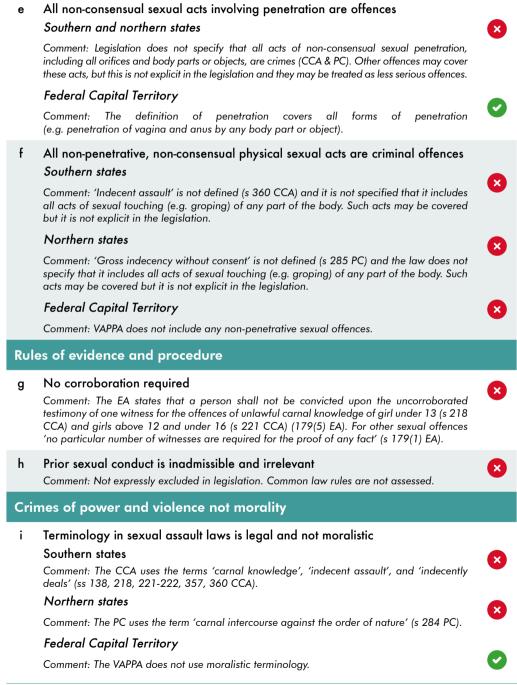
Comment: The VAPPA does not provide an immunity, exception or defence for marital rape and sexual assault (s 1 VAPPA).

c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given in the CCA, PC or the VAPPA. Only the VAPPA lists situations in which a person cannot consent, including use or threats of force, incapacity, e.g. due to intoxication and drug use and impersonating spouse (s 1 VAPPA).

d Evidence of resistance is not required

Comment: The legislation does not make clear that there is no requirement for evidence of resistance to the assault, such as physical injuries to the body, to prove that sexual activity took place without consent. It also does not make clear that consent cannot be inferred from a complainant's silence or submission during the assault.



Additional Criteria in Relation to Children

Meets Criteria: 💙 Yes 😑 Partly 😢 No 🥐 Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences

Southern and northern states

Comment: Neither the CCA or the PC contain comprehensive child sexual assault offences and some are inappropriate (e.g. excludes sexual grooming, sexual communication with a child, sexual assault by a person in a position of trust, (ss 216, 218, 221, 222 CC; s 285 PC). There are no close-in-age defences.

Federal Capital Territory

Comment: VAPPA does not contain child sexual assault offences. The CRA contains one child sexual assault offence of 'unlawful sexual intercourse with a child' (s 31 CRA).

b Child sexual assault offences are gender-neutral

Southern states

Comment: Child sexual offences are not gender-neutral (e.g. 'unlawful carnal knowledge of a girl under 13 and of a girl aged 13 and under 16'; 'indecently dealing with a boy under 14' (ss 218, 221-222 CCA).

X

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N/A

Northern states

Comment: The PC contains only one child sexual assault offence, which is gender-neutral (s 285 PC).

Federal Capital Territory

Comment: There are no child sexual assault offences in VAPPA.

Comment: The offence of 'unlawful sexual intercourse with a child' under the CRA is gender-neutral (s 31).

c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

Southern states

Comment: There is no defence of consent for sexual assault offences of girls under 16. This defence is available for assault of boys aged 14 and over (ss 216, 221-222 CC).

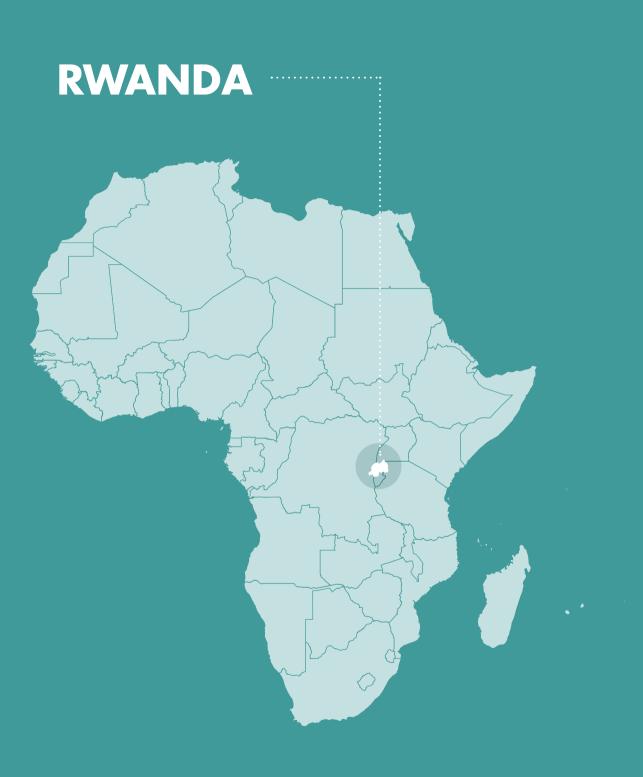
Federal Capital Territory

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally			
a	Consensual sexual activity with a person who has a disability is not an offence Southern states Comment: 'Unlawful carnal knowledge' with an idiot or an imbecile' is a crime regardless of consent (s 221 CCA).	×	
	Northern states Federal Capital Territory (VAPPA)	S	
Ь	No discriminatory, derogatory or stigmatising language is used Southern states Comment: The CCA uses the terms 'idiot' and 'imbecile' (s 221). Northern States Federal Capital Territory	× •	

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime		
a	Consensual same-sex sexual activity is not a crime Southern states	X
	Comment: Gross indecency between males and carnal knowledge against the order of nature are crimes (ss 214, 217 CCA).	
	Northern states	X
	Comment: Carnal intercourse against the order of nature with man, woman or animal is an offence (s 284 PC).	
	Federal Capital Territory	×
	Comment: Consensual same-sex sexual activity is a crime throughout Nigeria.	
	National law	×
	Comment: Any public display 'of same sex amorous relationship directly or indirectly' is an offence (s 4(2) SSMPA).	
b	No discriminatory, derogatory or stigmatising language is used	
	Southern states	
	Comment: The CCA uses the terms 'carnal knowledge against the order of nature' and 'gross indecency' (ss 214, 217 CCA).	×
	Northern states	X
	Comment: The PC uses the term 'carnal knowledge against the order of nature' (ss S284 PC).	W
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	N/A



Rwanda made significant reforms to its sexual offences law in late 2018 in a new penal code, the Law Determining Offences and Penalties in General, No 68/2018, (PC). The Law relating to the Criminal Code of Procedure (No 30/2013) applies to criminal matters, including sexual offences, but does not contain provisions relevant to this report. The common law and relevant case law are not assessed in this report.

Positive elements in the amended *PC* laws that meet the good practice standards applied in this report include: an updated offence of rape that covers all forms of non-consensual penetrative sex and not only 'sexual intercourse'; gender-neutral sexual offences; and criminalising marital rape and sexual assault. Consensual sexual activity with a person with a disability or between people of the same sex are not crimes.

The age of consent to sexual activity is non-discriminatory at 18 years for both boys and girls.

In a number of other respects, the sexual offences in the amended PC do not meet the good practice standards applied in this report. For example, there is no express definition of consent as free and voluntary agreement. The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injuries, to prove that sexual activity took place without consent. While marital rape is a crime, it carries a significantly lower penalty (3-5 years) than non-marital rape (10-15 years), which is discriminatory and not good practice.

specific There child are some sexual offences, but these are not comprehensive and do not cover the broad range of modern offences, such as aroomina. In some sexual offences. the PC uses non-legal, moralistic terms, such as 'defilement' of children. a term that is associated with the loss of virainity rather than a criminal assault on bodily integrity. A limited close-in-age defence to protect young people from being prosecuted for consensual sexual activity with their peers is available but is inadequate.

Rwanda is a state party to relevant international and regional human treaties, riahts includina the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities. International Covenant on Civil and Political Rights and Convention against Torture and Other Cruel. Inhuman or Dearadina Treatment or Punishment. Rwanda is also a party to the African Charter on Human and Peoples' Rights and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🕑 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

b Marital rape and sexual assault are crimes

Comment: Marital rape and sexual violence are crimes (arts 134, 136). However, the penalty differential between marital and non-marital rape and sexual assault is significant and discriminatory (3-5 years and 10-15 years respectively).

c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

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d Evidence of resistance is not required

Comment: The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

- e All non-consensual sexual acts involving penetration are offences
- f All non-penetrative, non-consensual physical sexual acts are criminal offences

Rules of evidence and procedure

g No corroboration required

Comment: Not expressly excluded in legislation. Common law rules are not assessed.

h Prior sexual conduct is inadmissible and irrelevant Comment: Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic

Comment: Sexual offences in the PC are in a chapter headed "Sexual Offences and Offences against Morality". The PC uses the terms 'indecent assault', 'public indecency' and 'defilement'.

Additional Criteria in Relation to Children

Meets Criteria: 💙 Yes 😑 Partly 😣 No 🥐 Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences Comment: There are specific child sexual assault offences (e.g. art 133). However, they are not comprehensive (e.g. they do not include sexual grooming, sexual communication with a child, sexual activity in front of a child). The PC sets the age of consent at 18 years. It provides only a limited close-in-age defence for young people (art 133).
 b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence
- b No discriminatory, derogatory or stigmatising language is used

4 Consensual Same-Sex Sexual Activity



SEYCHELLES

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The Seychelles sexual offences law is in the Penal Code (PC) adopted in 1955 and amended significantly in 1996, with only limited amendments since then, notably in 2016 to decriminalise consensual same-sex sexual activity. The Criminal Procedure Code 1955 and the Evidence Act (as amended) apply to criminal matters, including sexual offences, but do not contain provisions this report. relevant to The Seychelles applies common law rules of evidence. The common law and relevant case law are not assessed in this report.

In addition to the decriminalisation of consensual same-sex sexual activity in 2016, Seychelles' sexual offences laws meet several good practice standards assessed in this report. For example, its sexual assault laws are gender-neutral and cover a wide range of conduct not limited to penile penetration of a vagina, they do not criminalise consensual sexual activity with a person with a disability and do not allow the defence of consent to child sexual offences.

other respects, However, in the legislation does not meet the good practice standards applied below. For example, the legislation does not expressly state that marital rape and sexual assault are crimes, or that there is no defence of marriage to sexual assault. 'Consent' is not defined expressly as free and voluntary agreement to sexual activity. The PC criminalises only a small number of specific child sexual offences and they are not all gender-neutral (e.g. abduction with intent offences are limited to girls). There are no close-in-age defences to protect young people from being prosecuted for consensual sexual activity with their peers. In fact, the *PC* provides that if children below 15 years have sex, only the boy is charged.

The age of consent to sexual activity is 15 years for boys and girls, which is too low and not good practice.

Seychelles is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women. Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities and International Covenant on Civil and Political Rights. It has not joined the Convention against Torture and Other Cruel. Inhuman or Degrading Treatment or Punishment. Seychelles is also a party to the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Riahts on the Riahts of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🕑 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

b Marital rape and sexual assault are crimes

Comment: Marriage is a defence to the crimes of 'sexual interference with a child' under 15 (s 135) and with a dependent 15-18 (s 136). The legislation does not specify that there is no defence of marriage to sexual assault (s 130).

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c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary agreement to be given.

d Evidence of resistance is not required

Comment: The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Rules of evidence and procedure

g No corroboration required

Comment: Not specified in the legislation, but not required under common law. The Seychelles Court of Appeal abrogated the rule, but preserved judges' discretion to 'look for corroboration' in sexual offences cases (Raymond Lucas v Rep SCA No 17 of 2009 [28]).

h Prior sexual conduct is inadmissible and irrelevant Comment: Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic Comment: Sexual offences in the PC are in a chapter headed "Offences against morality" and the PC uses the terms 'indecent assault' (s 130), 'indecency' (s 135), 'carnal knowledge' (s 133), 'insulting modesty (s 135).

Additional Criteria in Relation to Children

Meets Criteria: 🕑 Yes 😑 Partly 🗴 No ? Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences
 Comment: There are very limited child sexual assault offences (e.g. ss 130, 135-137) and some may be inappropriate (e.g. they do not include sexual grooming, sexual communication with a child, sexual activity in front of a child). The PC provides for a low age of consent of 15 years and does not provide for close-in-age defences for young people.
 b Child sexual assault offences are gender-neutral Comment: The general offences are gender-neutral, but abduction with intent offences refer only to females (ss. 133, 133A, 134).
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

Comment: The defence of consent is only excluded if the child is under 15 years for the offence of 'sexual interference with a child' (ss 130(3), 135) and for 'sexual interference with a dependant' if the child is between 15-18 years (s 136).

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence
- b No discriminatory, derogatory or stigmatising language is used

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime a Consensual same-sex sexual activity is not a crime b No discriminatory, derogatory or stigmatising language is used c No discriminatory age of consent laws where same-sex sexual activity is not a crime



 \Diamond

Sierra Leone's sexual offences laws are in the Sexual Offences Act 2012 (SOA) and the Offences Aaainst the Person Act 1861 The 1965 (OAPA). Courts Act preserves the British common law as in force on 1 January 1880 where not superseded by subsequent legislation. In addition to statutory law, the Constitution preserves customary laws which vary across the country and, in many cases include Islamic law. In its Common Core Document to the UN human rights treaty bodies in 2012, the government of Sierra Leone stated that 70% of the population do not have access to the formal justice system. Many people therefore are regulated by customary law, as applied by their local chiefs rather than statutory law.

The common law, relevant case law, customary and Islamic law relating to sexual offences in Sierra Leone are not assessed in this report as they are outside its scope.

The SOA meets a number of important good practice criteria applied in this report. For example, sexual assaults are gender-neutral, 'consent' is defined as free choice by a person with the capacity to choose freely to engage in sexual activity, the offence of rape includes sexual penetration of genitals by any body part or object, and the law does not use derogatory terms to refer to people with disability. Marital rape and sexual assault are crimes.

The age of consent to opposite-sex sexual activity is 18 years for both boys and girls.

In other respects, however, the law does not meet good practice. Sierra Leone criminalises consensual sexual activity between men as 'buggery' and 'crimes against nature' with penalties of up to life imprisonment. The OAPA, which contains the offence of 'buggery', has not been amended and states the law as it was in force in England and Wales in 1880. Laws that criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be aender-neutral.

Further, the law allows the defence of consent to child sexual offences in some cases. There are no close-in-age defences to child sexual assault to prevent young people being criminalised for consensual sexual activity with their peers.

Sierra Leone is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination aaainst Women. Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, International Covenant on Civil and Political Rights and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Sierra Leone is also a party to the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria



Definition and scope of the crimes				
a	Sexual assault crimes are gender-neutral	⊘		
b	Marital rape and sexual assault are crimes	\bigcirc		
с	Free and voluntary consent is required Comment: 'Consent' is defined as agreement by choice and with the freedom and capacity to make that choice. Circumstances in which there can be no consent are listed (s 2 SOA).	0		
d	Evidence of resistance is not required Comment: Legislation expressly states that lack of evidence of resistance, such as physical injury, is not required to prove non-consent (s 2(3)(b) SOA). It also states that 'the fact that a person did not say or do anything to indicate consent to a sexual act is enough to show that the act took place without that person's consent' (s 2(3)(a)).	0		
е	All non-consensual sexual acts involving penetration are offences	0		
f	All non-penetrative, non-consensual physical sexual acts are criminal offences	0		
Rules of evidence and procedure				
g	No corroboration required Comment: Not expressly excluded in legislation. Common law rules are not assessed.	×		
h	Prior sexual conduct is inadmissible and irrelevant Comment: The law specifies that in determining whether or not a person consented, it is irrelevant that on an earlier occasion they freely agreed to engage in another sexual act with that person or some other person' (s 2(3) SOA).	0		
Crimes of power and violence not morality				
i	Terminology in sexual assault laws is legal and not moralistic Comment: The term 'indecent assault' is used (s 7 SOA).	0		

Additional Criteria in Relation to Children

Meets Criteria: 💙 Yes 😑 Partly 区 No ? Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences
 Comment: There are specific child sex offences (under the age of 18), including causing a child to watch sexual activity and sexual abuse by a person in position of trust (e.g. ss 19-23, 25-28, 33). However, there are no close-in-age defences.
 b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

Comment: The SOA excludes this defence for child sexual offences unless the parties are married (s 5 SOA)).

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence Comment: The SOA includes the offence of sexual activity with a person with a mental disability (s 8). The Act defines 'person with a mental disability' as a person incapable of giving or communicating free agreement to sexual activity because of that disability (s 2).

A similar offence applies to accused persons who are in a position of care worker or carer, unless the parties are married (s 9).

b No discriminatory, derogatory or stigmatising language is used

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime a Consensual same-sex sexual activity is not a crime Comment: The OAPA criminalises consensual same-sex sexual activity (s 61). b No discriminatory, derogatory or stigmatising language is used Comment: The term 'abominable Crime of Buggery, committed either with Mankind or with any Animal' is used in the OAPA, which also equates same-sex sexual activity with bestiality. c No discriminatory age of consent laws where same-sex sexual activity is not

c No discriminatory age of consent laws where same-sex sexual activity is not N/A a crime



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South Africa's sexual offences laws are in the *Criminal Law* (Sexual Offences and Related Matters) Amendment Act 2007, as amended (CLSO). The rules of evidence that relate to sexual offences are in the *Criminal Procedure Act* 1977 as amended (CPA). The common law and relevant case law are not assessed in this report.

All of the provisions of the *CLSO* covered by this review and the criteria below meet good practice standards. For example, consensual same-sex sexual activity is not a crime, sexual assault offences cover all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices and non-penetrative offences are broadly defined to include all forms of sexual assault. Consent is defined appropriately and there is a comprehensive range of specific child sexual assault provisions, including 'grooming' for sexual purposes. The *CLSO* also provides for close-in-

age defences to child sexual assaults for young people who engage in consensual sexual activity with their peers. Consensual sexual activity with a person with a 'mental disability' is not criminalised.

The age of consent is 16 years.

South Africa is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child. Convention on the Rights of Persons with Disabilities, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and International Covenant on Civil and Political Rights. It is also a party to the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Riahts on the Riahts of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🕑 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

- a Sexual assault crimes are gender-neutral
- Marital rape and sexual assault are crimes
 Comment: Marital rape and sexual assault are explicitly crimes (s 56 CLSO).
- c Free and voluntary consent is required
- d Evidence of resistance is not required
- e All non-consensual sexual acts involving penetration are offences
- f All non-penetrative, non-consensual physical sexual acts are criminal offences

Rules of evidence and procedure

g No corroboration required

Comment: The CLSO states that 'a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court with caution, on account of the nature of the offence' (s 60) and the CPA states that an accused may be convicted of any offence on the single evidence of any competent witness (s 208).

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h Prior sexual conduct is inadmissible and irrelevant

Comment: The legislation expressly states that evidence of prior sexual conduct is not admissible unless the court determines it is relevant. A list of possible situations in which such evidence may be admitted is given. These are narrowly defined, protecting the privacy and other rights of the complainant and balancing them with the rights of the accused (s 227 CPA).

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic

Additional Criteria in Relation to Children

Meets Criteria: 🕑 Yes 😑 Partly 🗴 No ? Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences Comment: There are comprehensive child sexual assault offences and close-in-age defences (e.g. ss 15-23 CLSO).
- b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence
- b No discriminatory, derogatory or stigmatising language is used

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime				
α	Consensual same-sex sexual activity is not a crime	v		
b	No discriminatory, derogatory or stigmatising language is used	0		
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	?		

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Uaanda's sexual offence laws are in the Penal Code 1950 (PC) (as amended). The Criminal Procedure Code Act 1950 (CPC) applies to sexual offences and other crimes. The common law and relevant case law are not assessed in this report. The CPC has not been amended since its introduction and the law of procedure and evidence on sexual offences needs review to ensure it explicitly excludes a requirement for corroboration and irrelevant evidence of the complainant's past sexual history or reputation to protect their rights.

The PC was amended in 2007 to update some sexual offences provisions. including expanding the definition of 'defilement' to include boys. While expanding the definition was a positive step, the use of the term 'defilement' is not good practice. Overall, the PC is outdated and does not conform with good practice and international standards in many areas assessed in this report. For example, marital rape and other sexual assault are not expressly criminalised. Consent is not defined to require free and voluntary agreement. Not all acts of non-consensual sexual penetration and sexual touching are criminalised and, with one exception, the crimes are not gender-neutral covering only assaults against females. Rape carries the death penalty, which is not consistent with human rights compliant good practice.

There are limited child sexual offences. The age of consent to sexual activity is 18 years for both boys and girls, but there are no close-in-age defences to protect young people under the age of consent from being prosecuted for consensual sexual activity with their peers. The *PC* criminalises consensual sexual activity with an intellectually disabled person regardless of their capacity to freely and voluntarily agree to sexual activity, and uses derogatory terms 'idiots' and 'imbeciles'.

Uganda criminalises same-sex sexual activity. Criminalising same-sex sexual activity has been held in court decisions in other Commonwealth iurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all nonconsensual sexual acts, including anal 'rape', should be included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Uganda is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Women. against Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, International Covenant on Civil and Political Rights and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Uganda is also a party to the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

Comment: The offences of rape and unlawful and indecent assault are limited to women and girls (ss 123, 128).

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b Marital rape and sexual assault are crimes

Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.

c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

d Evidence of resistance is not required

Comment: The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

Comment: Rape is limited to 'carnal knowledge' of a female and does not cover penetration of other orifices by penis, or of a vagina and other orifices by an object or other body part of a woman or 'rape' of a male (s 123). 'Defilement of persons under 18 years of age' covers all of these acts (s 129 PC), but there is no equivalent provision for adults. Other offences (e.g. 'indecent assault') may cover these acts, but this is not explicit in the legislation and they may be treated as less serious offences.

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: The legislation does not define 'indecent assault' (s 128 PC) or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body. Such acts may be covered, but it is not explicit in the legislation and the offence is limited to assaults on females.

Rules of evidence and procedure

g No corroboration required

Comment: The corroboration rule is not expressly excluded by legislation. Although the common law is not assessed, it is noted that several Ugandan court decisions have held that there is no requirement of corroboration in sexual offences, that it is discriminatory against women and therefore unconstitutional (e.g. Basoga Patrick v Uganda, Criminal Appeal No 42 of 2002) and that a court may convict on uncorroborated evidence after a suitable warning (e.g. Okello v Uganda, 2014).

h Prior sexual conduct is inadmissible and irrelevant

Comment: Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic

Comment: PC refers to 'carnal knowledge' and 'modesty' (s 123), 'indecent acts' (e.g. s147) and 'defilement' (s 129).



Additional Criteria in Relation to Children

Meets Criteria: 🕑 Yes 😑 Partly 🗴 No ? Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences
 Comment: There are very limited child sexual assault offences (e.g. ss 123, 128-129) (e.g. do not cover grooming). There are no close-in-age defences for consensual acts between young people.
- b Child sexual assault offences are gender-neutral Comment: The offence of defilement in the PC applies to girls and boys (s 129), but other provisions apply only to girls (e.g. ss 123, 128) or boys (s 147).
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)
 Comment: The PC excludes this defence for a complainant under 18 years (s 129(2)).

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence Comment: 'Carnal connection' and attempts with 'idiots and imbeciles' in circumstances not amounting to rape are offences, regardless of consent (s 130 PC).
- b No discriminatory, derogatory or stigmatising language is used Comment: The term 'idiots and imbeciles' is used in the PC (s 130).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime			
a	Consensual same-sex sexual activity is not a crime Comment: Consensual same-sex activity is criminalised (ss 145-148 PC).	×	
b	No discriminatory, derogatory or stigmatising language is used Comment: The terms 'carnal knowledge' and 'against the order of nature' are used.	×	
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	N/A	

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UNITED REPUBLIC OF TANZANIA

The United Republic of Tanzania's sexual offences laws are in the Penal Code 1981 (as amended) (PC). The Sexual Offences Special Provisions 1998 (SOSPA) Act amended the sexual offences division of the Penal Code. Those amendments added new offences and modified some existing sexual offences, such as rape and indecent assault. The Evidence Act 1967 (as amended) applies to criminal matters including sexual offences. The common law and relevant case law are not assessed in this report.

Some of the amendments made to the PC by the SOSPA in 1998 were positive, including specifying that for the crime of rape, evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent. It also specified that men who abuse a position of authority or trust to commit rape will be subject to the maximum penalty.

The age of consent to opposite-sex sexual activity is 18 years for boys and girls.

However, some other amendments made by SOSPA increased the aap between Tanzania's sexual offences laws and good practice. In particular, SOSPA significantly increased the penalties for consensual sexual activity that is most associated with LGBT+ people. Tanzania criminalises private, consensual samesex sexual activity under the PC, including the 'unnatural offences' of 'carnal knowledge of any person against the order of nature' and 'permit[ting] a male person to have carnal knowledge of him against the order of nature'. Criminalising same-sex sexual activity has been held in court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all nonconsensual sexual acts, including anal 'rape', should be included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

In most of the other areas assessed in this report, Tanzania's sexual offences leaislation also fall short of meeting good practice standards for human rights compliant laws. For example, rape is limited to penile penetration of a woman, there are some exceptions for marital rape and there are discriminatory evidentiary rules, such as allowing evidence of prior sexual conduct to be used to attack the credibility of a complainant. 'Consent' is not defined. There are only limited child sexual offences and there are no close-in-age defences to protect young people from being prosecuted for consensual sexual activity with their peers.

Tanzania is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities and International Covenant on Civil and Political Rights. It has not joined the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Tanzania is also a party to the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

Comment: Some offences are gender-neutral and others are not (e.g. 'rape' is limited to rape of a woman by a man, s 130 PC; 'sexual assault on persons' and 'grave sexual abuse' are gender-neutral, ss 135, 138A, 138C PC).

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b Marital rape and sexual assault are crimes

Comment: Marital rape is only a crime during periods of legal separation (s 130, 132 PC).

c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

d Evidence of resistance is not required

Comment: The PC provides that 'evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent' (s 130(4)(b) SOSPA). It does not make clear that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

Comment: 'Rape' is limited to penile penetration of a female. There are no legislative offences that expressly criminalise non-consensual sexual penetration by other body parts or objects of other orifices. Other offences may cover these acts but this is not explicit in the legislation and they may be treated as less serious offences.

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: The legislation does not define other sexual assaults (e.g. 'grave sexual abuse') or specify that they include all acts of sexual touching (e.g. groping) of any part of the body. Such acts may be covered but it is not explicit in the legislation. Note that 'grave sexual abuse' must be committed by a male for the purpose of his 'sexual gratification' (s 138C PC). Both of these limitations narrow the scope of the offence considerably.

Rules of evidence and procedure

g No corroboration required

Comment: Not expressly excluded in legislation. Common law rules are not assessed.

h Prior sexual conduct is inadmissible and irrelevant

Comment: The law specifies that the credibility of a complainant in a rape charge can be 'impeached' if it is shown that she 'was of generally immoral character' (s 164 EA). This would allow irrelevant evidence of sexual reputation, including prior sexual conduct with the accused or another person without adequate safeguards for the complainant's rights.

Crimes of power and violence not morality

i Terminology in sexual assault laws is legal and not moralistic

Comment: The PC uses the terms such as 'carnal knowledge', 'gross indecency', 'indecent', 'insult the modesty', 'defilement' (e.g. ss 137, 138A, 138B, 138D, 140).

Additional Criteria in Relation to Children

Meets Criteria: 💙 Yes 😑 Partly 😢 No 🥐 Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences

Comment: Specific child sexual assault offences are very limited (e.g. 'sexual exploitation of a child' under 18, 'indecent assault of a boy under 14', ss 138B, 156 PC). Statutory rape only applies to girls under 18 (s 130 PC). There is no equivalent provision to cover boys. There are no offences covering, e.g. sexual grooming and sexual communication with a child or sexual assault of boys aged 14-18. Sexual assault of girls aged 15-18 is also excluded if they are married to the perpetrator. There are no close-in-age defences.

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- b Child sexual assault offences are gender-neutral
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

Comment: This defence is not available for 'rape' of a girl under 18, unless she is married to the perpetrator and not separated from him (s 130 PC), 'sexual assault' of a child under 18 (s 135 PC) or indecent assault of a boy (s 156(2)).

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence Comment: It is an offence to knowingly have 'carnal knowledge' with a woman or girl 'idiot or imbecile' regardless of consent (s 137 PC).
- b No discriminatory, derogatory or stigmatising language is used Comment: The PC uses the terms 'idiot or imbecile' (s 137).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a Consensual same-sex sexual activity is not a crime Comment: 'Indecency', 'carnal knowledge against the order of nature', 'permitting a male person to have carnal knowledge of him or her against the order of nature' and 'gross indecency between persons' are crimes (ss 138A, 154, 157).
 b No discriminatory, derogatory or stigmatising language is used
 - Comment: The PC uses the terms 'gross indecency', 'unnatural offences', and 'against the order of nature'.
- c No discriminatory age of consent laws where same-sex sexual activity is not N/A a crime



Zambia's sexual offences laws are in the *Penal Code 1931* (PC), as amended. The rules set out in the *Criminal Procedure Code Act* and the *Evidence Act* apply to sexual offences under the *PC*. The common law and relevant case law are not assessed in this report.

In 2005, the PC was amended to raise the age of consent to 16 for opposite-sex sexual activity and make most sexual offences gender-neutral. However, these positive reforms were not extended to other sexual offences provisions in the PC, many of which do not meet good practice. In particular, rape is limited to penile penetration of the vaging, marital rape and sexual assault are not expressly criminalised. the specific child sexual assault offences not comprehensive and are are weakened by not providing appropriate close-in-age defences. These defences are necessary to avoid criminalising voung people and children who engage in consensual sexual activity with their peers. The PC also criminalises sexual intercourse with a woman who has an intellectual disability regardless of her capacity to freely consent and uses the derogatory terms 'imbecile' and 'idiot'. The legislation criminalises consensual same-sex sexual activity, such as 'carnal knowledge against the order of nature' and 'gross indecency'. Criminalising consensual same-sex sexual activity has been held in court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. criminalise Laws that consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the general sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be aender-neutral.

Zambia is a state party to relevant international and regional human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women. Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, Convention against Torture and Other Cruel, Inhuman or Dearadina Treatment or Punishment. and International Covenant on Civil and Political Rights. It is also a party to the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Universal Criteria

Meets Criteria: 🗸 Yes 😑 Partly 🗙 No ? Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral

Comment: Sexual offences are gender-neutral except for rape. Rape is unlawful carnal knowledge by a person of a woman or girl (s 132 PC).

b Marital rape and sexual assault are crimes

Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.

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c Free and voluntary consent is required

Comment: There is no express definition of consent requiring free and voluntary consent to be given.

d Evidence of resistance is not required

Comment: The legislation does not state that there is no requirement for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.

e All non-consensual sexual acts involving penetration are offences

Comment: There are no legislative offences that expressly criminalise all acts of nonconsensual sexual penetration, including by any body part or objects of all orifices. Other offences (e.g. 'indecent assault') may cover these acts but this is not explicit in the legislation and they may be treated as less serious offences.

f All non-penetrative, non-consensual physical sexual acts are criminal offences

Comment: The legislation does not define 'indecent assault' or other sexual offences or specify that they include all acts of sexual touching (e.g. groping) of any part of the body. Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

g No corroboration required

Comment: Not expressly excluded in legislation. Common law rules are not assessed.

h Prior sexual conduct is inadmissible and irrelevant Comment: Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

 Terminology in sexual assault laws is legal and not moralistic Comment: Legislation uses the terms 'carnal knowledge', 'indecent' assault' and 'defilement' (ss 132, 137 138 PC).

Additional Criteria in Relation to Children

Meets Criteria: 🕑 Yes 😑 Partly 🗴 No ? Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences Comment: Child sexual assault offences are very limited and some are inappropriate (e.g. excludes some forms of sexual assault, ss 137-138 PC). There are no close-in-age defences.
- b Child sexual assault offences are gender-neutral Comment: The child sexual offences are gender-neutral except for the offence of 'indecent assault of a boy under 14' (s 157 PC).
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences)

Comment: Exclusion of the defence is very limited – only to girls under 12 (offence of 'indecent assault of a girl under 12 years', s 137(2) PC).

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence Comment: 'Unlawful carnal knowledge knowing a woman or a girl to be an idiot or an imbecile' regardless of consent in circumstances not amounting to rape is a crime (s 139 PC).
- b No discriminatory, derogatory or stigmatising language is used Comment: The legislation uses the terms 'idiot' and 'imbecile' (s 139 PC).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime				
a	Consensual same-sex sexual activity is not a crime Comment: Consensual and non-consensual 'carnal knowledge against the order of nature' and 'gross indecency' with another male are offences (ss 155, 158 PC).	×		
b	No discriminatory, derogatory or stigmatising language is used Comment: The legislation uses the terms 'carnal knowledge against the order of nature' and 'gross indecency' (ss 155, 158 PC).	×		
с	No discriminatory age of consent laws where same-sex sexual activity is not a crime	N/A		

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- 1 The other organisations of the Alliance are the Kaleidoscope Trust, *The Royal Commonwealth* Society and Sisters for Change.
- 2 The Human Dignity Trust (2019) <http://www.humandignitytrust.org/pages/NEWS/ News?NewsArticleID=578> (last accessed January 2020).
- 3 The Hon Theresa May, UK Prime Minister, 'Speech' (Speech delivered to the Commonwealth Joint Forum Plenary, UK, 17 April 2018) https://www.gov.uk/government/speeches/pm-speaks-at-thecommonwealth-joint-forum-plenary-17-april-2018 (last accessed January 2020).
- 4 Resources (2019) The Human Dignity Trust https://www.humandignitytrust.org/hdt-resources/ (last accessed January 2020).
- 5 UN human rights treaties available at <www.ohchr.org>.
- 6 African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, (Maputo Protocol) 11 July 2003 <https://icj-kenya.org/jdownloads/Publications/ Maputo%20Protocol%20-%20A5.pdf I> (accessed January 2020).
- 7 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) http://oas.org/en/mesecvi/convention.asp (accessed January 2020).
- 8 Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), <https://www.coe.int/en/web/istanbul-convention/basictexts> (accessed January 2020).
- 9 For example, Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in the ASEAN Region 2012, https://asean.org/?static_post=declaration-on-theelimination-of-violence-against-women-in-the-asean-region-4 (accessed January 2020).
- 10 Pacific Leaders Gender Equality Declaration 2012, https://www.forumsec.org/pacific-leaders-gender-equality-declaration/>. See also https://www.forumsec.org/pacific-leaders-gender-equality-declaration/>. See also https://www.forumsec.org/pacific-leaders-gender-equality-declaration/>. See also https://www.pilonsec.org/images/stories/PLGED_intros.pdf>.
- Yogyakarta Principles plus 10 (2016) < https://yogyakartaprinciples.org/principles-en/yp10/> (accessed January 2020).
- 12 Committee on the Elimination of Discrimination Against Women, General Recommendation No 19: Violence against women, 11th sess, contained in UN Doc A/47/38 (1992) < https://www.ohchr.org/ EN/HRBodies/CEDAW/Pages/Recommendations.asp> (accessed January 2020).
- 13 UN Women, Handbook for Legislation on Violence against Women (2012) (UN Handbook) and Supplement to the Handbook for Legislation on Violence against Women, 'Harmful Practices' (2012) <http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-onviolence-against-women> (accessed January 2020).
- 14 See also for example, UN Office on Drugs and Crime (UNODC), Model Strategies and Practical Measures for the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice (1999) <http://www.unodc.org/documents/justice-and-prison-reform/ crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_ against_Women_in_the_Field_of_CP_and_CJ.pdf> (accessed January 2020); Southern Africa Development Community (SADC) Parliamentary Forum, Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage (2016).

- 15 Africa Commission on Human and Peoples' Rights, Guidelines on Combating Sexual Violence and its Consequences in Africa (Naimey Guidelines) (2017) < https://www.achpr.org/legalinstruments/ detail?id=4> (accessed January 2020). Authoritative guidance on state implementation of regional treaties of relevance is provided by the expert bodies responsible for monitoring implementation. For example, the Follow-up Mechanism to the Belém do Pará Convention (MESECVI) in relation to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará), <http://oas.org/en/mesecvi/about.asp> (accessed January 2020).
- 16 The criteria used to assess rape and sexual assault laws in this report reflect the fact that the vast majority of Commonwealth states distinguish between sexual and other assaults and between penetrative (e.g. rape) and non-penetrative (e.g. indecent assault) sexual offences with the penalty usually varying according to the *nature of the assault*. One Commonwealth country, Canada, takes a different approach. It includes sexual assault as part of its general assault offences and grades the offences and penalties according to the perceived *degree of harm* to the complainant rather than on the nature of the assault (see Canada checklist in Part C in the Caribbean and Americas Regional Report). This approach can also meet good practice standards applied in this report.
- 17 See, for example, *The Global Rape Epidemic* (2017) Equality Now [Gaps in protecting women and girls from sexual violence] https://www.equalitynow.org/the_global_rape_epidemic_campaign (accessed January 2020).
- 18 P. Imrana Jalal, Handbook on Law for Pacific Women, A Legal Rights Handbook Fiji Women's Rights Movement, (1998) (Handbook on Law for Pacific Women) 74 http://www.fwrm.org.fj/images/fwrm2017/PDFs/resources/Law for Pacific Women.pdf> (accessed January 2020).
- 19 *R v R* [1992] 1 A.C. 599.
- 20 For example, see Committee on the Rights of the Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, UN Doc CRC/C/GC/20 (6 December 2016) [40].
- 21 Petroni, S., Das M, Sawyer S. (2018). The Lancet Child & Adolescent Health. Protection versus rights: age of marriage versus age of sexual consent, December 3, 2018. Quoted in Marriage vs Age of Sexual Consent, Girls Not Brides, https://www.girlsnotbrides.org/wp-content/uploads/2019/01/ Age-of-Marriage-brief.pdf (accessed January 2020).
- 22 Committee on the Rights of the Child, General comment No. 13 (2011) on *The right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (18 April 2011) [25].
- 23 See, for example, the observations about assumptions or myths made about women and girls with disability by the Committee on the Rights of Persons with Disabilities, General Comment No 3 (2016) on women and girls with disabilities, 16th sess, UN Doc CRPD/C/GC/3 (25 November 2016) [30] & [38] <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en> (accessed January 2020).
- 24 See, for example, D Stubbs & S Tawake (2009) Pacific Sisters with Disabilities: At the intersection of discrimination (UNDP Pacific Centre, Suva, Fiji, 2009) < https://pacificwomen.org/research/pacificsisters-with-disabilities/> (accessed January 2020).

- 25 For detailed information on countries that criminalise consensual same-sex sexual activity please see www.humandignitytrust.org.
- For example, in 1981, in the case of *Dudgeon*, the European Court held that laws in Northern Ireland that criminalised same-sex sexual activity violated the right to privacy under article 8 of the European Convention on Human Rights, even when they were not enforced. It ruled that no state in its jurisdiction had the right to criminalise all same-sex sexual activity. *Dudgeon v United Kingdom*, Appl No 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981 (*Dudgeon*) <https://www.refworld.org/cases,ECHR,47fdfaf7d.html> (accessed January 2020). Also, *Norris v Ireland*, 13 Eur. H.R. Rep. 186 (1988) <https://www.humandignitytrust.org/wp-content/uploads/ resources/Norris_v_Ireland.pdf> (accessed January 2020); *Modinos v Cyprus*, 7/1992/352/426, Council of Europe: European Court of Human Rights, 23 March 1993 <https://www.refworld.org/ cases,ECHR,402a21a04.html> (accessed January 2020).
- 27 Toonen v Australia, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994 <https://www.refworld.org/cases,HRC,48298b8d2.html> (accessed January 2020).
- See, for example, UN Commission on Human Rights, Promotion and Protection of Human Rights: 2003/... Human rights and sexual orientation, 59th sess, Agenda Item 17, UN Doc E/CN.4/2003/L.92 (17 April 2003) <https://undocs.org/en/E/CN.4/2003/L.92>; H E Wegger Christian Strømmen, 2006 Joint State: 3rd session of the Human Rights Council (1 December 2006) ARC International <http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement/> (accessed January 2020); Report of the Human Rights Council: 17/19 Human rights, sexual orientation and gender identity, 17th sess, UN Doc A/66/53 (17 June 2011) 172 < https://www.right-docs.org/ doc/a-hrc-res-17-19/> (accessed January 2020).
- 29 African Commission on Human and Peoples' Rights, 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (2014) https://www.achpr.org/sessions/resolutions?id=322 (accessed January 2020).
- 30 Yogyakarta Principles plus 10 (2016) <https://yogyakartaprinciples.org/principles-en/yp10/> (accessed January 2020).

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