

A close-up photograph of a hand painting a face on a textured, reddish-brown surface. The hand is holding a paintbrush and is in the process of painting the mouth area. The background is dark and textured, possibly asphalt or concrete. The overall scene suggests a street art or graffiti project.

Next Steps Towards Reform:

Assessing good practice
and gaps in Commonwealth
sexual offences legislation

Caribbean & Americas

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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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Next Steps

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About the Research

This research was commissioned by the Human Dignity 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 'best-practice' laws.
- **LGBT+** refers to lesbian, gay, bisexual, transgender and other gender non-conforming 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.



Photo credit: Joanna Nix

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.



Photo credit: Bakir Custovic

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 non-consensual 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 additional 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 non-consensual 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 gender-neutral 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.

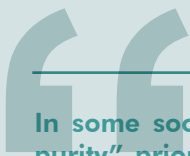
Age of consent laws and close-in-age defences

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 decisions 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 CARIBBEAN AND AMERICAS



The Caribbean and Americas region of the Commonwealth comprises 13 countries. A few countries in the region have made significant reforms to the sexual offences laws inherited from the British colonial era, bringing the sexual offences laws covered in this study into line to varying degrees with international human rights and good practice standards. For example, treating sexual assaults as crimes of power and violence and not attacks on morality or honour (e.g. Guyana, Canada), providing gender-neutral sexual assault provisions (e.g. Grenada), expressly criminalising marital rape and sexual assault (e.g. Belize), specifying that evidence of resistance to an assault is not required to prove non-consent (e.g. Guyana) and not criminalising consensual sexual activity with a person with disability (e.g. Belize, Guyana, Canada).

However, as the checklists below demonstrate, the laws of many others in the region do not meet most of the good practice standards described in this report. For example, providing a marriage defence or exception for rape (e.g. Barbados, Jamaica), allowing the defence of consent to child sexual offences (e.g. Saint Vincent and the Grenadines), criminalising consensual sexual activity with a person with disability regardless of the person's capacity to freely consent (e.g. Bahamas) and continuing to use derogatory and moralistic terms in legislation, such as 'imbecile', 'idiot', 'defilement', 'unnatural acts', 'indecent assault' and 'buggery'. In addition, all but four countries in the region continue to criminalise all consensual same-sex sexual activity. Only The Bahamas, Belize, Canada and Trinidad and Tobago have fully decriminalised same-sex sexual activity, although the

Government of Trinidad and Tobago has appealed the first instance court decision that resulted in decriminalisation. The appeal had not been decided at the time of writing. Of these four countries only Canada has repealed these crimes from its legislation.

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 *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *Convention on the*

Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. 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.



WE ARE ALL HUMANS
FROM CONCEPTION TO NATURAL DEATH

TODOS SOMOS HUMANOS
DESDE LA CONCEPCIÓN HASTA LA MUERTE NATURAL

REHUMANIZEINTL.ORG

Photo credit: Maria Oswalt

ANTIGUA AND BARBUDA



Antigua and Barbuda's sexual offences laws are in the *Sexual Offences Act 1995 (SOA)*. The Act was last amended in 2004, however no substantive change to the relevant provisions was made. The common law and relevant case law are not assessed in this report.

The legislation is outdated and does not reflect good practice or international human rights standards. In particular, rape is narrowly defined as penile penetration of a vagina, and marital rape is not an offence except in the narrow circumstances where the parties are divorced, separated by order or agreement or there is an order in place against the husband. There are child sexual assault offences, however, they are not comprehensive. They are also weakened by inadequate close-in-age exceptions necessary to avoid criminalising young people and children who engage in consensual sexual activity with their peers. The age of consent is 16. The legislation also criminalises sexual intercourse with a woman who has an intellectual disability, using the derogatory term 'mentally subnormal.'

In a positive development, Antigua and Barbuda has begun a process of reviewing the Sexual Offences Act as part of a 5-year Caribbean regional justice sector reform project funded by the Canadian government (IMPACT Justice).

The Government has indicated, however, that the review does not include the offences of buggery and serious indecency, which criminalise same-sex sexual activity, in violation of international human rights law and contrary to good practice.

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

Antigua and Barbuda is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *the 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*.

1 Sexual Assault



Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown


Definition and scope of the crimes

- a Sexual assault crimes are gender-neutral** 
Comment: 'Rape' only captures acts perpetrated by a man against a woman (s 3); some child sexual assault offences refer to 'male persons' (offenders) and 'female persons' (complainants) (ss 6-7). Other offences are gender-neutral (e.g. ss 14-15).
- b Marital rape and sexual assault are crimes** 
Comment: Marital rape is only a crime in very limited circumstances (e.g. the parties are divorced or separated or there is an order against the husband molesting or having sexual intercourse with his wife (s 4).
- 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 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.
- e All non-consensual sexual acts involving penetration are offences** 
Comment: No definition other than 'sexual intercourse' is provided (s 3). The legislation does not specify that all acts of penetration, including all orifices and body parts or objects are crimes. Other offences may cover these acts, 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: 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 14). 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: Prior sexual conduct with the accused is admissible. Prior sexual conduct with persons other than the accused is not admissible unless the judge determines such evidence is necessary for a fair trial (s 27). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant).

Crimes of power and violence not morality

- i Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the moralistic term 'indecent assault' (s 14).

2 Sexual 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: Child sexual assault offences are very limited (e.g. ss 6-7, 9-10, 12, 14-15) (e.g. they do not include sexual grooming, sexual communication with a child, sexual activity in front of a child). The close-in-age defence is inappropriate as it applies if the accused is not 'wholly or substantially to blame' (ss 6-7), which perpetuates discriminatory and false myths that blame the complainant for the assault.

b Child sexual assault offences are gender-neutral 

Comment: There are specific offences for male persons who assault 'female persons' (s 6) and female persons who assault 'male persons' (s 7) with different penalties.

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 sexual intercourse, indecent assault or serious indecency with a child under the age of consent (16 years) (ss 5, 7, 14-15), or a child under 18 if the child is adopted, a step-child, foster child, dependant or an employee (ss 9-10).

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 'mentally subnormal' regardless of consent (s 11).

b No discriminatory, derogatory or stigmatising language is used 

Comment: The legislation uses the term 'mentally subnormal' (s 11).

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: 'Buggery', and 'serious indecency' between people of the same sex are offences regardless of consent (ss 12, 15).

b No discriminatory, derogatory or stigmatising language is used 

Comment: The legislation uses the terms 'buggery' (s 12) and 'serious indecency' (s 15).

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

N/A

BAHAMAS, THE



In The Bahamas, sexual offences law are found in the *Sexual Offences and Domestic Violence Act 1991* [Chapter 99] (SODV), as amended. The *Evidence Act 2006* [Chapter 65] (EA) contains relevant evidentiary law for all sexual offences, including on the admissibility of evidence of past sexual history of sexual assault complainants. The common law and relevant case law are not assessed in this report.

The provisions of the SODV Act in some respects meet the good practice and human rights standards assessed in this report, including having gender-neutral offences and a comprehensive definition of sexual assault covering penetration of all orifices by any body part or object. Most moralistic terminology has been removed.

Other aspects of the provisions, however, do not accord with good practice and some international human rights standards and require reform. For example, marital rape, inappropriately termed 'sexual intercourse without consent by a spouse', is not an offence unless the parties are formally separated or divorced or a domestic violence protection order is in place. Additionally, rules of evidence such as a requirement for corroboration and enabling the sexual history of the complainant to be admitted in some circumstances should be reformed. Although there are gender-neutral child sexual assault offences there are no close-in-age exceptions. The age of consent to heterosexual sexual activity is 16. The Bahamas continues to

criminalise sexual activity with people with disability regardless of whether they give free and voluntary consent.

A number of reforms to address weaknesses in the SODV have been prepared, however they had not been enacted at the time of writing. In its Concluding Observations on The Bahamas in 2018, the CEDAW Committee urged it to enact the reforms.

The Bahamas has partially decriminalised same-sex sexual activity. Consensual same-sex sexual activity between people over 18 in private is not a crime. However, same-sex sexual activity for people under 18 years is still a crime even when it is consensual. This contrasts with heterosexual sexual activity for which the age of consent is 16. This is discriminatory and does not meet human rights compliant good practice standards. Discriminatory ages of consent have been held by courts in other jurisdictions, such as Canada, Hong Kong and South Africa, to be unconstitutional.







The Bahamas is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *UN 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*, *Convention on the Rights of Persons with Disabilities* and *International Covenant on Civil and Political Rights*.

1 Sexual Assault

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 is only a crime in very limited circumstances (e.g. the parties are divorced or separated or there is an order against the husband molesting or having sexual intercourse with his wife, s 15 SODV).
- 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 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.
- 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 define 'indecent assault' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body (s 17 SODV). 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 addressed in the legislation. Common law rules are not assessed.
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Past sexual history with the accused is admissible. Past sexual history with other persons is not admissible unless the court is satisfied that such evidence is necessary for a fair trial (s 34 EA). This is an insufficient safeguard for the privacy and other rights of a complainant.

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 assault' (s 17 SODV).

2 Sexual 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: Child sexual assault offences are very limited (e.g. ss 10-11, 14, 16-17 SODV) (e.g. they do not include sexual grooming, sexual communication with a child, 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) 

Comment: There is no defence of consent for sexual intercourse with a child under 16 (ss 10-11 SODV), indecent assault of a child under 14 (s 17 SODV), or both crimes if the child is under 18 and a dependent child of the accused (e.g. adopted or position of trust) (s 14 SODV). The law allows a defence of consent to an indecent assault of a child between the ages of 14-16. This means that the age of consent to sexual activity other than sexual intercourse is 14 years, which is not consistent with good practice.


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 has a 'mental disorder' regardless of consent (s 12 SODV).

b No discriminatory, derogatory or stigmatising language is used 


Comment: The legislation defines 'mental disorder' as 'severe subnormality' or 'subnormality' (s 12 SODV).

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 sexual activity with a person over 18 in private is not an offence. It is an offence to have sexual intercourse with a person of the same sex who is a minor (under 18) or with a person of the same sex in public regardless of consent (s 16 SODV). The penalty is up to 20 years imprisonment. No similar provision applies in relation to sexual acts in public by people of opposite sexes. This conduct may be covered by the misdemeanor of 'grossly indecent acts' (s 490, Penal Code), although this is not specified in the legislation This is a minor offence that carries a fine of \$150 (s 212 Penal Code).

b No discriminatory, derogatory or stigmatising language is used 

Comment: Same-sex sexual intercourse for 16-18-year olds is criminalised as an 'unnatural crime' in the same provision as 'bestiality' (s16 SODV).

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

Comment: Same-sex sexual activity between the ages of 16 - 18 is an offence, but not for heterosexual sexual activity (s 16 SODV).



Photo credit: Chris Benson

BARBADOS



Barbados' sexual offences laws are in its *Sexual Offences Act 1992* [Chapter 154] (SOA). Although that law contains some provisions that meet the good practice standards assessed in this report, overall the legislation is outdated and does not reflect good practice or meet international human rights standards. The common law and relevant case law are not assessed in this report.

Provisions of the SOA that meet good practice and international human rights standards include a comprehensive definition of penetrative sexual offences. In addition, the SOA includes a comprehensive definition of sexual assault covering penetration of all orifices by any body part or object. Other aspects of the law do not accord with good practice and require reform.

While introducing marital rape into the law as a crime by the *Sexual Offences (Amendment) Act 2016* was a significant and positive reform, the amendments did not go far enough to meet good practice standards – marital rape is a crime only if it can be proven that it was accompanied by force or fear. Marital rape should be criminalised in every circumstance without exception and should carry the same penalty as non-spousal rape.

Other areas in which Barbados' sexual offences law falls short of good practice include using derogatory terms such as 'imbecile' and 'idiot' in relation to persons with disability, as well as 'indecent assault', 'buggery' and 'unnatural acts'. Barbados also

continues to criminalise consensual same-sex sexual activity between men and between women international law. Criminalising same-sex sexual activity has been held by court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Colonial era laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assaults provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Although there are gender-neutral child sexual assault offences, which is good practice, they are weakened by a lack of close-in-age provisions which would allow consensual sexual activity between young people of similar age.

The age of consent is 16.







Barbados is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *UN 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*.

1 Sexual Assault



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 marital rape which is only perpetrated by a husband on a wife (s 3).
- b **Marital rape and sexual assault are crimes** 
Comment: Rape in marriage is only an offence if there is threat or use of force (s 3).
- c **Free and voluntary consent is required** 
Comment: There is no express definition of consent requiring free and voluntary consent to be given (s 3).
- d **Evidence of resistance is not required** 
Comment: 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 intercourse took place without consent. It should also 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: Legislation does not specify penetration by body parts other than a penis or objects (s 3(6)). Such acts may be covered by other offences, 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: 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 11). 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 expressly states that no corroboration is required for conviction, however the judge must warn the jury that it may be unsafe to convict in the absence of corroboration (s 28). The requirement that the judge warn the jury rather than leaving it to their discretion undermines the abolition of the rule in s 28.
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Evidence of prior sexual history with the accused is admissible. Prior sexual history other than with the accused is admissible by leave of the judge in limited circumstances (s 26).

Crimes of power and violence not morality




- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the moralistic term 'indecent assault' (s 11).

2 Sexual 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: Child sexual assault offences are very limited (e.g. ss 4, 5, 7, 12) (e.g. they do not include sexual grooming, sexual communication with a child, sexual activity in front of a child).
- 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 sexual intercourse with a person who is an 'idiot, imbecile or mentally subnormal' whether consensual or not (s 8).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The legislation uses the terms 'idiot, imbecile or mentally subnormal' to refer to persons with intellectual disability (s 8).

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: 'Buggery' (s 9) and 'serious indecency' (s 12) are offences.
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The terms 'buggery' (s 9) and 'serious indecency' and 'natural and unnatural acts' (s 12) are used.
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

BELIZE



In Belize, sexual offences laws are found in the *Sexual Offences Act 1992* [Chapter 154 of the *Criminal Code 2000*] (SOA), and the *Evidence Act 2000* (EA). The common law and relevant case law are not assessed in this report.

The law was amended in 2013 by the *Criminal Code (Amendment) (No 2) Act* introducing a range of positive reforms. For example, the new legislation adopted gender-neutral language, removed any exception for marital rape and expanded the definition of sexual assault to include penile penetration of all orifices. It provided for close-in-age defences to avoid criminalising young people and children who engage in consensual sexual activity with their peers. The age of consent in Belize is 16. It also amended the provisions criminalising all sexual activity with persons with intellectual disability, whether consensual or not, bringing the law closer into line with human rights standards that require protection of every person's right to sexual autonomy.

However, some aspects of the legislation still do not meet good practice and international human rights standards. These include not recognising the crime of sexual penetration by an object or any body part unless the complainant is under 16 ('rape' is limited to penile penetration), not legislating expressly to remove the requirement for corroboration or prohibiting the use of prior sexual history evidence.

In 2016, the Belizean Supreme Court held that criminalisation of

same-sex sexual activity under section 53 of the *Criminal Code 2000* was unconstitutional and struck it down as void (*Caleb Orozco v The Attorney General of Belize*). This made Belize the first former British colony in the Caribbean to decriminalise same-sex activity through the courts. However, at the time of writing, section 53 had not been removed from the *Criminal Code* and this express step should be taken to avoid any confusion.







Belize is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *UN 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*.

1 Sexual Assault



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: 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.
- e **All non-consensual sexual acts involving penetration are offences** 
Comment: Rape includes penile penetration of all orifices (s 46 SOA) but does not include penetration by an object or body parts other than a penis unless the complainant is under 16 years (ss 47A, 47B SOA). Such acts may be covered by other offences, 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: The legislation defines 'indecent assault' broadly to include all forms of touching of a sexual nature (s 45 SOA).

Rules of evidence and procedure

- g **No corroboration required** 
Comment: Not expressly addressed in the legislation. Common law not assessed.
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Prior sexual conduct with the accused is admissible. Prior sexual conduct with persons other than the accused is not admissible unless the judge determines that such evidence is necessary for a fair trial (s 74 EA). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant).

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 assault' (s 45 SOA).

2 Sexual 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: Child sexual assault offences are limited (e.g. ss 47, 47A, 47B, 47C, 47D, 47E SOA) (e.g. they do not include sexual grooming, sexual communication with a child, 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** 
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: Although the previous language of 'idiot' and 'imbecile' was removed, the legislation retains the terms 'mentally defective' and 'unsound mind' (s 47H, 47I, and 47J SOA).

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** 
Comment: Although declared void and no longer enforceable after the Orozco case, the offences have not been removed from the Criminal Code (s 53). The void provision refers to 'carnal intercourse against the order of nature' and equates same-sex sexual activity with bestiality. This should be expressly removed from the legislation.
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** 

CANADA



In Canada, the criminal law is a federal responsibility and sexual offences are found in the federal *Criminal Code of Canada (CC)*, which applies uniformly across Canada. The common law and relevant case law are not assessed in this report.

Sexual assault is included in the Offences against the Person part of the Code (Part VIII), along with the assault offences, which define assault, including for the purposes of the sexual assault provisions. Penalties for sexual assault are higher than penalties for assault. Further, the legislation does not distinguish between penetrative and non-penetrative offences unlike most other Commonwealth jurisdictions. Instead, there are three levels of sexual assault with penalties based on the degree of harm to the complainant rather than on the type of non-consensual sexual act at issue. This approach also requires that consent be expressed affirmatively through words or conduct, passivity or submission is not sufficient and proof of violence or resistance is not required to prove sexual assault. It is sometimes referred to as an 'affirmative consent' approach. If all the good practice elements are present, this type of approach can meet good practice standards for human rights compliant sexual offences legislation.

Sexual assault reform has been an ongoing process in Canada. Sexual offences were overhauled in 1983 when antiquated sexual offences were repealed and replaced by the sexual offences noted above and other provisions, including rules governing the admissibility of the evidence of the complainant's prior sexual history. In 1992 the prior sexual

history evidentiary rules were amended in response to a Supreme Court of Canada decision (*Seaboyer*, 1991) that struck the 1983 provisions down and the consent provisions (definition and list of circumstances in which consent is not obtained in law) as well as a limitation on the accused's ability to advance the defence of mistaken belief in consent, were added. Further positive reforms were made in 1997 and 2018 but these are not assessed here.

Many of the provisions of the *CC* meet good practice. All sexual assaults are criminalised. Corroboration is explicitly not required, no moralistic terms are used, there are no offences for consensual sexual activity with persons with disability. There are some close-in-age exceptions which apply to sexual activity where one or both people are under 16 if the sexual activity is consensual and there is no relationship of trust, dependency or authority and the relationship is not otherwise exploitative of the younger person.

In June 2019, Canada completed the process, begun in 1969, of fully decriminalising consensual same-sex sexual activity by repealing the discriminatory age of consent law it had maintained (s 159 *CC*). It had specified different ages of consent for sexual activity (16 years) and anal intercourse between unmarried people (18). This disproportionately affected people who engage in same-sex anal intercourse. Successive decisions by appellate courts had found this to violate the *Canadian Charter of Rights and Freedoms*.

Canada 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*, the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disabilities*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *International Covenant on Civil and Political Rights*.

It has not joined the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*.



Photo credit: Greg Rosenke

1 Sexual Assault



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 
- 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 
- h Prior sexual conduct is inadmissible and irrelevant 
Comment: Prior sexual conduct with the accused only is admissible in very limited circumstances with many safeguards. It is 'not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief' (s 276.1). Evidence of sexual reputation to challenge credibility is inadmissible (s 277).

Crimes of power and violence not morality


- i Terminology in sexual assault laws is legal and not moralistic 

2 Sexual 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 
- 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 legislation provides for no defence of consent under the age of consent (16 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 
- 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 

DOMINICA



In Dominica, sexual offences are found in the *Sexual Offences Act 1998 (SOA)*, amended in 2016 by the *Sexual Offences (Amendment) Act 2016*, which updated some of the provisions in accord with good practice. The common law and relevant case law are not assessed in this report.

The 2016 reforms included criminalising all forms of penetration by penis, object and other body parts, recognising aggravated assaults, creating a new offence of sexually grooming a child and removing many moralistic and inappropriate terms from the legislation. Some aspects of the legislation do not meet good practice however. For example, under the SOA marital rape is treated less seriously than non-spousal rape, while offences of penetration with objects and of non-genital body parts are treated less seriously than penile penetration despite evidence indicating the harm suffered by the complainant can be equally devastating.

The revisions did not repeal the criminalisation of sexual activity with a person with an intellectual disability regardless of consent and left in place outdated, derogatory terminology. The age of consent in Dominica is 16 for heterosexual sexual activity. There are no close-in-age defences to avoid criminalising young people and children who engage in consensual sexual activity with their peers.

'Buggery', whether between people of the same or different sex, continues to be criminalised. The revisions in 2016

increased the penalty for this offence. 'Buggery' is most associated with same-sex sexual activity. Criminalising same-sex sexual activity is a breach of international human rights law. It has also been held by court decisions in other Commonwealth jurisdictions to be unconstitutional, for example in Belize, Botswana, India and Trinidad and Tobago. Colonial era laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assaults provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.






Dominica is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, the *UN Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disabilities* and the *International Covenant on Civil and Political Rights*. It has not ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1 Sexual Assault



Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown


Definition and scope of the crimes

- a Sexual assault crimes are gender-neutral** 
Comment: All offences are gender-neutral except an act of indecency between a woman and a girl (s 15).
- b Marital rape and sexual assault are crimes** 
Comment: Rape in marriage is an offence only if there is force or threat of force or the use of drugs (s 3) unlike rape outside of marriage. It also carries a lower penalty than non-marital rape (14 years and life imprisonment respectively).
- 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 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.
- 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 define 'indecent assault' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body (s 13). 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 expressly states that corroboration is not required, however a judge may direct the jury: 'before finding any fact to be proved by the testimony of a single witness, you should carefully review all the testimony upon which the proof of fact depends' (s 28). The law partly meets this criterion as it gives a judge a discretion as to whether or not to warn the jury about any uncorroborated evidence.
- h Prior sexual conduct is inadmissible and irrelevant** 
Comment: Evidence of prior sexual history with the accused is admissible. Prior sexual history other than with the accused is admissible only if the judge determines it is 'necessary for a fair trial', but there are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant) (s 30).

Crimes of power and violence not morality




- i Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the moralistic term 'indecent assault' (s 13).

2 Sexual 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 are specific child sexual assault offences (e.g. ss 7-10, 13), including grooming (s 22A). Adding further offences (e.g. sexual communication with a child, sexual activity in front of a child) would strengthen the law.
- 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: Sexual intercourse with a person with a 'mental disorder' is an offence regardless of consent (s 11).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The legislation uses the term 'mental disorder' (s 11).

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: 'Buggery' (s 16), 'indecenty between a woman and a girl (s 15) and 'gross indecenty' (s 14) are offences.
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The legislation uses the terms 'buggery' (s 16), 'indecenty' (s 15) and 'gross indecenty' (s 14).
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

GRENADA



In Grenada sexual offences laws are found in the *Criminal Code 1990* [Chapter 1] (CC) as amended by the *Criminal Code (Amendment Act) 2012*. The common law and relevant case law are not assessed in this report.

The 2012 amendments made significant positive changes to sexual assault offences, such as introducing gender-neutral offences, a comprehensive definition of penetrative offences with serious penalties, and criminalising marital rape. However, some aspects of the legislation do not meet good practice and international human rights standards, for example, not legislating expressly against a requirement for corroboration nor prohibiting the use of evidence of the prior sexual history of the complainant. Derogatory terms are used to refer to persons with intellectual disability and the legislation removes the capacity of such persons to consent to sexual activity. Although there are gender-neutral child sexual assault offences, there are no close-in-age exceptions to avoid criminalising young people and children who engage in consensual sexual activity with their peers. The age of consent for heterosexual sexual activity is 16 years.

Although penalties for sexual offences are not assessed, it is noted that marital rape is treated less seriously than non-spousal rape and penetration with objects is treated less seriously than penile penetration, despite evidence indicating the harm suffered by the complainant can be equally devastating.



Grenada has not decriminalised same-sex sexual activity. 'Unnatural sexual connection' between two consenting adults is an offence. Criminalising same-sex sexual activity is a breach of international human rights law.

It has also been held by court decisions in other Commonwealth jurisdictions to be unconstitutional, for example in Belize, Botswana, India and Trinidad and Tobago. Colonial era laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assaults provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.







Grenada is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *UN 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 ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1 Sexual Assault



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: 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.
- e **All non-consensual sexual acts involving penetration are offences** 
Comment: Only penetration by a penis, other body parts and objects of a vagina and anus are offences (s 177-178). Penile penetration of mouth is not included in the definition. Such acts may be covered by other offences, 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: 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 81A). 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 addressed in the legislation. In R v Gilbert (2002) 61 WIR 174, the Privy Council overturned the common law corroboration rule, and left to the judge's discretion whether to warn a jury about the reliability of uncorroborated evidence in sexual offence cases. Better practice would be to expressly abrogate the rule in legislation.
- 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 'indecenty' and 'indecent assault' (s 81A).

2 Sexual 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: Child sexual assault offences are very limited (e.g. ss 180-181, 183C) (e.g. they do not include sexual grooming, sexual communication with a child, sexual activity in front of a child). There are no close-in-age exceptions in the legislation.
- 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: Sexual intercourse with 'an imbecile' is an offence regardless of consent (s 182).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The legislation uses the term 'imbecile' (s 182).

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: It is an offence for any two persons to have an 'unnatural connection' (s 431).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The legislation uses the term 'unnatural connection' (s 431).
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

GUYANA



Guyana undertook major reforms of its sexual assault laws in 2010 when it enacted the *Sexual Offences Act 2010 (SOA)* and again in 2013 under the *Sexual Offences Amendment Act 2013*. The common law and relevant case law are not assessed in this report.

Guyana's High Court has established a specialist Sexual Offences Court to hear all first instance charges of rape and sexual assault, as well as offences of domestic violence. The Court in the capital, Georgetown, is equipped with a special room for hearings and a panel of support staff. There is a plan to roll out at least one other specialist court room for the Sexual Offences Court in other parts of the country.

In many aspects, Guyana's reformed sexual assault laws meet good practice standards, including for example providing for gender-neutral offences, not criminalising sexual activity with a person with a disability and legislating to ensure that marital rape is a crime. The reforms also introduced a definition of 'consent' to mean freely given agreement to have sexual intercourse or other sexual contact. The law criminalises a range of child sexual assaults, including grooming and excludes the defences of consent for these offences. The age of consent in Guyana is 16 for heterosexual sexual activity. There are close-in-age defences to child sexual assaults to avoid criminalising young people and children who engage in consensual heterosexual sexual activity with their peers, provided that the accused person is not in a 'position of trust' in relation to the child. A case study on Guyana's rape and sexual assault laws is included as an example of good practice in the *Good Practice Sexual Offences Report 2019*.

However, Guyana continues to criminalise consensual same-sex sexual activity, and uses derogatory and stigmatising language to do so, under the *Criminal Law (Offences) Act (CLOA)*, violating its international legal obligations and the fundamental rights of every person to equality, equal protection of the law, privacy and non-discrimination. Criminalising same-sex sexual activity has been held by court decisions in other Commonwealth jurisdictions to be unconstitutional, for example in Belize, Botswana, India and Trinidad and Tobago. Several Guyanese government ministers have indicated the law criminalising same-sex sexual conduct should be changed, but at the time of writing no reforms have been initiated. Colonial era laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assaults provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.







Guyana is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *UN 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*.

1 Sexual Assault



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: 'Consent' is defined as 'words or overt actions by a person competent to give informed consent indicating a freely given agreement' to sexual activity (s 2). There is an inclusive list of circumstances in which consent can never be given (ss 7- 8).
- d **Evidence of resistance is not required** 
Comment: The legislation specifies that consent and belief in consent cannot be inferred by reason of silence or lack of physical resistance on the part of the complainant (s 5).
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: Sexual assault includes all non-consensual touching 'in a sexual way' (s 4). 'Sexual' is defined to include penetration, touching or any other activity a reasonable person would consider 'sexual' (s 2).

Rules of evidence and procedure

- g **No corroboration required** 
Comment: Legislation expressly states that corroboration is not required (s 69).
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Prior sexual history or reputation of a complainant with the accused or another person is not admissible (ss 78-79).

Crimes of power and violence not morality




- i **Terminology in sexual assault laws is legal and not moralistic** 

2 Sexual 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 are specific child sexual assault offences (e.g. ss 10-16, 18-21), including sexual activity in front of a child (s 12) and sexual grooming (s 13).
- 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: Defence expressly excluded for all child sexual assault offences (e.g. s 9).

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: The CLOA criminalises same-sex sexual activity, including 'gross indecency with a male person' (s 352), and 'buggery' (s 354). Other offences may be used to criminalise same-sex sexual activity including 'indecent acts' (s 355) and laws criminalising 'bawdy houses' (s 356-7).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The CLOA uses the terms 'gross indecency', 'buggery', 'indecent acts', 'laws against morality' and treats buggery in the same way as bestiality.
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

JAMAICA



The *Sexual Offences Act 2009 (SOA)* and the *Offences against the Person Act 1864 (OAPA)* are the primary pieces of legislation in relation to sexual offences in Jamaica. The common law and relevant case law are not assessed in this report.

While the SOA made significant changes to earlier laws, it does not conform with good practice in a number of areas. For example, it uses a narrow form of rape and non-consensual sexual assaults and does not state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance. The OAPA criminalises consensual same-sex sexual activity and reflects an outdated approach to other sexual offences crimes.

A Select Parliamentary Committee of the Jamaican Parliament reported in December 2018 on its review of the SOA, OAPA, as well as the *Domestic Violence Act 1996* (as amended) and the *Child Care and Protection Act 2004*. It recommended a number of reforms, including making marital rape a crime. However, it also recommended against extending rape or 'grievous assaults' to cover non-consensual same-sex and heterosexual anal penetration because this might open the crime of buggery under the OAPA to court challenge. This means non-consensual anal penetration must be charged as buggery, which is inconsistent with good practice and is not human rights compliant. It also carries a significantly lower penalty than heterosexual rape under the SOA. The criminalisation of consensual same-sex sexual activity has been held by decisions in other jurisdictions such as Belize, Botswana, India and Trinidad and Tobago to be unconstitutional and is clearly a breach of international human rights

law. Colonial era laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral. Other aspects of the law also require reform, including making adult sexual offences and child sexual offences gender-neutral, criminalising all acts of non-consensual sexual penetration, groping and touching of all body parts. With respect to crimes against children under 16, which is the age of consent in Jamaica, the SOA should be amended to provide for gender-neutral crimes with appropriate close-in-age defences to prevent criminalising consensual same-sex and different-sex sexual activity between young people and their peers. Jamaica is involved in several sexual offences law reform and international cooperation programmes, and its courts have introduced Model Guidelines for Sexual Offences Cases in the Caribbean Region.

Jamaica is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *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 the *International Covenant on Civil and Political Rights*. It has not ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1 Sexual Assault



Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown


Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
Comment: Rape is limited to penile penetration of a vagina, as are other sexual intercourse crimes (ss 3, 5, SOA). Some crimes are limited to male perpetrators. (e.g. ss 76, 79, OAPA).
- b **Marital rape and sexual assault are crimes** 
Comment: Marital rape is only a crime in very limited circumstances (e.g. the parties are divorced or separated or there is an order against the husband molesting his wife or he knows he has a sexually transmitted disease (s 5 SOA).
- 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 necessary 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.
- e **All non-consensual sexual acts involving penetration are offences** 
Comment: Rape is sexual intercourse by penile penetration. 'Grievous sexual assault' covers many other acts and orifices, but non-consensual anal rape of women and men with a penis is only covered under the buggery offence (s 76 OAPA), which is not good practice.
- 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 13 SOA). Such acts may be covered, but it is not explicit in the legislation. Note section 8 (SOA) refers to 'sexual touching' of children.

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The legislation expressly states that corroboration is not required, however a judge may give a corroboration warning to the jury (s 26 SOA).
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Evidence of prior sexual history with the accused is admissible. Prior sexual history other than with the accused is admissible by leave of the court in limited circumstances (s 27 SOA). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant).

Crimes of power and violence not morality




- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: SOA uses terms 'indecent assault' and 'immoral purpose'.

2 Sexual 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 are specific child sexual assault offences, including grooming (ss 8-10, 12-13, 15, 20-21 SOA). However, some are outdated and they are not comprehensive (e.g. they do not include sexual communication with a child, sexual activity in front of a child). No close-in-age defences are provided.
- 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** 
Comment: The SOA uses the term 'mental disorder' which is defined as 'mental retardation' (s 2).

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** 
Comment: OAPA uses 'abominable crime' of 'buggery', 'carnal knowledge'.
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

SAINT KITTS AND NEVIS



Sexual offences laws in Saint Kitts and Nevis are found in the *Offences against the Person Act 1986 (OAPA)* and the *Criminal Law Amendment Act 2002 (CLAA)*. The *Evidence Act 2011 (EA)*, applies to all criminal offences. The common law and relevant case law are not assessed in this report.

Saint Kitts and Nevis has not revised its primary law on sexual offences, the *OAPA*, since 2002. These laws do not meet good practice and are not human rights compliant in many respects. For example, they do 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. Sexual assaults, including child sexual offences, are not gender-neutral and sexual intercourse with people with intellectual disability is criminalised regardless of whether it is consensual. The age of consent is 16 years for opposite-sex sexual activity. Saint Kitts and Nevis does not have any close-in-age defences to child sexual assaults to prevent criminalising consensual sexual activity between young people.

The law provides the option of corporal punishment (whipping) of an offender who is 16 years or under instead of a custodial sentence for 'defilement of a girl under 14' (s 4(2) *CLAA*). This is contrary to human rights and good practice and should be repealed.

Saint Kitts and Nevis criminalises consensual same-sex sexual activity, maintaining 'buggery' and 'sodomy' as crimes under the *OAPA* and equating them with bestiality. They are referred to as 'infamous crimes' in the law. Criminalising consensual same-sex sexual activity has been held by court decisions in other Commonwealth jurisdictions to be unconstitutional, for example in Belize, Botswana, India and Trinidad and Tobago. Colonial era laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assaults provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.







Saint Kitts and Nevis is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *UN 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*. It is not a party to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or *International Covenant on Civil and Political Rights*.

1 Sexual Assault



Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown


Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
Comment: Rape provision does not specify gender. (s 47 OAPA). 'Indecent assault' specifies it as an assault against females only. The 2002 reforms only covered females (CLAA).
- 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: Not specified in the law. The legislation does not 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 also 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: The legislation does not specify that all acts of penetration, including all orifices and body parts or objects are crimes. Such acts may be covered by other offences, 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: 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. 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 the legislation. The common law is not assessed.
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Evidence of prior sexual activity with the accused is admissible. Evidence of prior sexual conduct of a complainant with a person other than the accused is inadmissible except with the leave of the court and only if the court determines that such evidence is necessary for a fair trial (s 46 EA). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant).

Crimes of power and violence not morality




- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the terms 'indecent assault', 'carnal knowledge', 'defilement' (s 72 OAPA).

2 Sexual 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 are very limited child sexual offences (e.g. 'defilement' of girls only under 16 (ss 3-4 CLAA)) and no close-in-age exceptions.
- b **Child sexual assault offences are gender-neutral** 
Comment: Offences specify girls only, excluding boys.
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 
Comment: This defence is only expressly excluded for an indictable 'indecent assault of a girls under 16' (s 47(2) OAPA) and 'cohabitation with unmarried girl under sixteen years' (s 7(2) CLAA).

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' of a 'female idiot or imbecile' is an offence regardless of consent (s 4 CLAA).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: OAPA uses 'idiot' and 'imbecile'.

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: 'Buggery' is criminalised but not defined (s 56). 'Indecent assault upon any male' is a misdemeanour (s 57 OAPA).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: 'Buggery', 'sodomy', 'unnatural offences', 'abominable crime' and 'infamous crime' are used (ss 56-57 OAPA). 'Buggery' is equated with bestiality (s 56 OAPA).
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

SAINT LUCIA



The criminal law on sexual offences is contained in the *Criminal Code 1920*, [Chapter 3.01]. Saint Lucia last updated its *Criminal Code in respect of sexual offences in 2004*. The *Evidence Act 2002* [Chapter 4.15] includes relevant provisions on evidence and procedure. The common law and relevant case law are not assessed in this report.

In a number of respects the *Criminal Code* does not meet good practice, especially by not criminalising marital rape (except in cases of separation, divorce and peace binding orders) and providing for lower penalties for such offences. The rules of evidence in sexual assault cases provide for some important safeguards for complainants, such as modifying the common law rules of evidence on corroboration and questioning on sexual history. However, these do not go far enough to sufficiently protect complainants. Amending these provisions would not undermine the rights of an accused to a fair trial, and they should be reformed.

There are specific child sexual assault offences. However, they are undermined or weakened by defences for marriage, regardless of the age of the child which can be as low as 12 years and inadequate close-in-age exceptions. These are necessary to protect children and young people from being criminalised when they engage in consensual sexual activity with their peers. The age of consent is 16 for heterosexual sexual activity.

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







Saint Lucia is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *UN Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*. It has signed but not ratified the *Convention on the Rights of Persons with Disabilities* and *International Covenant on Civil and Political Rights*. It has not ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1 Sexual Assault



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 is a crime only in very limited circumstances (e.g. the parties are divorced or separated or there is a peace binding order (s 123(3)). The penalty for marital rape and sexual assault is less than for non-marital rape (14 years and life imprisonment respectively). Also exempt is rape of a minor by an adult when they are married to each other (s 128).
- c **Free and voluntary consent is required** 
Comment: There is no express definition of consent requiring free and voluntary consent to be given or for the accused to take steps to confirm consent (e.g. s 123). Consent can be revoked at any time, but husband and wives cannot revoke consent once married, unless they are divorced or separated by Court order (s 23).
- 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 necessary 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.
- 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 define 'indecent assault' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body (e.g. ss 130, 132). Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The Evidence Act expressly abolishes the common law rule of corroboration for all offences (s 135) except in relation to 'offences of a sexual nature' (s 136(2)) which states that a judge shall, unless there are good reasons not to, warn the jury that the evidence of the complainant may be unreliable (s 136(2)). The requirement that the judge warn the jury in any circumstance, rather than leaving it to their discretion, undermines the abolition of the rule.
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: No evidence can be given or questions asked about the prior sexual history of a complainant with a party other than the accused (s 25(3), EA). No evidence or questions are permitted about the reputation of complainant in sexual matters (s 25(2) EA). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant).

Crimes of power and violence not morality




- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The Criminal Code uses the terms 'defilement' (ss 142, 154-156), 'indecent act' (s 130), 'indecent assault' (s 131), 'gross indecency' (s 132), 'natural or unnatural' intercourse (s 132), 'buggery' (s 133).

2 Sexual 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: Child sexual offences are very limited (e.g. 124, 126-128, 130) and some are inappropriate (e.g. they do not include sexual grooming, sexual communication with a child, sexual activity in front of a child, and 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 a number of child sexual assaults where the child is under the age of consent (16 years) (e.g. ss 124, 126(1), 128(2), 130(2)). Note that marriage is a defence for all offences with children of all ages, including below 12 years of age (e.g. ss 23(2), 126, 128(4), 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** 
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The legislation refers to 'defilement' of persons with 'mental disorders' (ss 154-155).

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: Crimes include 'gross indecency' (s 132), 'natural or unnatural' intercourse (s 132), 'buggery' (s 133).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: Law uses terms 'gross indecency'(s 132), 'natural or unnatural' intercourse (s 132), 'buggery' (s 133).
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

SAINT VINCENT AND THE GRENADINES



St Vincent and the Grenadines' sexual offences laws are in its *Criminal Code 1988*, [Chapter 171], (as amended) (CC), *Criminal Procedure Code 1988*, [Chapter 172] (as amended) (CPC) and *Evidence Act 1988*, [Chapter 220] (as amended) (EA). The common law and relevant case law are not assessed in this report.

Saint Vincent and the Grenadines has undertaken some reform initiatives, such as the *Domestic Violence Act 2015* and the *Child Justice Bill 2018*, but these do not go far enough and further significant reforms are needed to meet good practice, human rights standards.

Specific areas of concern include that the *Criminal Code* defines rape and sexual assault too narrowly and marital rape is not expressly criminalised. This was also observed by the UN as part of the state party reporting process. Some child sexual offences are not gender-neutral. The *Code* criminalises sexual intercourse with a woman who has an intellectual disability regardless of her consent and uses the derogatory terms 'mental defective' and 'subnormality'. The age of consent to sexual activity is 15 years for girls, which is too low. There is no minimum age of consent for boys, which is also not good practice. The age of 15 for girls is lower than most other countries in the Commonwealth. There are no close-in-age defences to avoid criminalising consensual sexual activity where one or both people are under the age of consent and they are peers. Saint Vincent has not abolished the corroboration rule,

which is discriminatory and often impacts negatively on sexual assault complainants.

In comments to the *CEDAW Committee* as part of its periodic review process in 2015, the Government confirmed that Saint Vincent's criminal law does not expressly criminalise rape within a marriage, but that it applied the common law established in the Privy Council decision in *R v R* [1992] 1 A.C. 599, which abolished the exception for rape in marriage. The Government stated that future reforms may codify the common law on this point. It also referred to possible future reforms to update the definition of rape to implement recommendations made by the Director of Public Prosecutions. At the time of writing, these reforms had not been completed. Any future reform of Saint Vincent's sexual offences laws must meet good practice for example, defining rape as gender-neutral and covering all orifices and objects.

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

Saint Vincent is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *UN 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 the *International Covenant on Civil and Political Rights*.



Photo credit: Sammie Vasquez

1 Sexual Assault


Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

a Sexual assault crimes are gender-neutral 

Comment: Under the CC, the offence of rape is 'unlawful sexual intercourse by a man of a woman (s 123). Other sexual offences e.g. 'indecent assault', refer to acts by a 'man' (s 127). 'Unnatural acts' offences are gender-neutral.

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.

In comments to the CEDAW Committee in 2015, the Government stated that it has accepted that rape in marriage is a crime under the common law (House of Lords R v R [1992] 1 A.C. 599). This needs to be legislated to meet this criterion.

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 necessary 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.

e All non-consensual sexual acts involving penetration are offences 

Comment: The Code does not specify that all acts of penetration, including all orifices and body parts or objects are crimes. Such acts may be covered by other and they may be treated less seriously.


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

Comment: The Code includes only limited kinds of sexual assault and does not define 'indecent assault' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body (e.g. ss 127-128). 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 abolished in the legislation. Common law is 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 'gross indecency', 'indecent assault', 'indecent practices', 'buggery' (e.g. ss 127- 128, 146-148).

2 Sexual 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 are child sexual offences (e.g. ss 124-125, 127-129), however they are not comprehensive and some are inappropriate (e.g. they do not include sexual grooming, sexual communication with a child, sexual activity in front of a child, age of consent is too low, no close-in-age defences).

b Child sexual assault offences are gender-neutral 

Comment: Unlawful sexual intercourse offences cover girls only (ss 124-125). Indecent assault refers to "child" (ss 127-128).


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

Comment: The legislation only excludes the defence of consent for 'indecent assault' (s 127(2)) with a child under 15.


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 'intercourse with a woman mental defective' regardless of consent (s 126).

b No discriminatory, derogatory or stigmatising language is used 


Comment: The Criminal Code uses the terms 'mental defective' and 'subnormality' (s 126).

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: 'Gross indecency' between adults of the same sex (s 148) and 'buggery' (s 146) are crimes.

b No discriminatory, derogatory or stigmatising language is used 

Comment: Law uses 'buggery', 'gross indecency', 'indecent practices' (e.g. ss 146-148).

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

TRINIDAD AND TOBAGO



Trinidad and Tobago's sexual offences laws are set out in the *Sexual Offences Act* [Chapter 11:28] (SOA) (as amended by the *Sexual Offences (Amendment) Act 2000*) and the *Children Act 2012* (CA). The common law and case law are not assessed in this report.

The 2012 Act introduced major changes to the law on sexual offences against children. It provides a framework for offences against children, including sexual assault. It has a number of positive features, including criminalising a range of sexual offences against children and providing close-in-age defences to prevent criminalising consensual sexual activity between young people. Importantly, this defence is explicitly excluded if there is a breach of trust or coercive situations. However, the provisions are discriminatory as they do not cover consensual same-sex activity between young people and their peers.

The SOA needs to be modernised to explicitly include as crimes all sexual acts when non-consensual. Currently, the Act does not expressly cover all acts of sexual touching, unlike the CA. The SOA also criminalises consensual sexual intercourse with a woman with intellectual or cognitive disability and uses the offensive and derogatory term, 'mentally subnormal' to describe such a person.

The SOA and the CA are not aligned in some important respects. For example, although penalties are not assessed in this report, it is noted that the CA imposes more serious penalties than the SA for comparable offences, such as touching and other non-penetrative

acts. These offences carry sentences of 10-20 years or life imprisonment under the *Children Act*, whereas they carry 5 years under the SOA. Also, the age of consent differs. It is 18 under the *Children Act* and 16 under the SOA.

In 2018, the High Court held that criminalising same-sex sexual activity is unconstitutional (*Jason Jones v Attorney General*). The Government has appealed this decision. At the time of writing, the appeal had not been decided. Laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assaults provisions, such as 'rape' and 'sexual assault'. All of these crimes should be gender-neutral. The Government should decriminalise all consensual same-sex sexual activity, including extending the close-in-age defences in section 20 of the CA to consensual same-sex activity among young people who are peers.



Trinidad and Tobago is a state party to relevant international and regional human rights treaties, including the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, *UN 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 Cruel, Inhuman and Degrading Treatment or Punishment* and *International Covenant on Civil and Political Rights*.

1 Sexual Assault



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 law expressly criminalises both marital rape and 'grievous sexual assault' by a husband, including in recognised heterosexual 'cohabitants' (de facto couples) (ss 4(5) and 4A(4) SOA).
- 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 necessary 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.
- e **All non-consensual sexual acts involving penetration are offences** 
Comment: Rape is sexual intercourse by penile penetration. 'Grievous sexual assault' covers penetration of orifices by other body parts or objects (ss 4, 4A SOA), but non-consensual anal rape of women and men is only covered by the buggery provisions, which is not good practice.
- 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. Such acts may be covered, but it is not explicit in the legislation. Note the Children Act criminalises a number of acts of sexual touching of children (s 19 SOA).

Rules of evidence and procedure

- g **No corroboration required** 
Comment: Section 15A of the Evidence Act abolishes the rule.
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Evidence of prior sexual history with the accused is admissible. Prior sexual history other than with the accused is admissible by leave of the judge in limited circumstances (s 30 SOA). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant).

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: Legislation uses the terms 'indecent acts', 'defilement' (e.g. ss 13-15, 18 and 20 SOA).

2 Sexual 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: The Children Act has a number of child sexual offences, including crimes of penetration and touching, grooming, and sexual activity in front of a child (e.g. ss 18-19, 24-25 SOA). Section 20 of the Children Act decriminalises sexual activity between children of opposite sexes who are close in age, provided that the older person is not in a position of trust etc. (ss 19-21 SOA). There are close-in-age defences for opposite-sex sexual activity.

b Child sexual assault offences are gender-neutral 

Comment: Offences in the Children Act are gender-neutral.

Note s 20 only applies 'decriminalisation' of consensual child-child sexual penetration and touching only to opposite-sex children. All provisions criminalising consensual same-sex sexual activity are unconstitutional following the Jones case.

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 to indecent assault of a child under the age of consent (16 years) (s 15 (2), SOA).


Marriage is a defence, except for anal penetration (ss 26 (2), 27 SOA).

Note the Sexual Offences Act provides a person under age of 16 cannot consent to indecent assault, and s 15 of the Children Act provides no consent to sexual touching under age 16. The Children Act defines a child as a person under 18 years (s 3).


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: Sexual intercourse with a 'mentally subnormal' person is a crime regardless of consent (s 12 SOA).

b No discriminatory, derogatory or stigmatising language is used 

Comment: Law uses the term 'mentally subnormal' and defines it with derogatory and stigmatising language (s 12(3) SOA).

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 High Court determined that the criminalisation of same-sex sexual activity was unconstitutional. However, the Government is appealing this decision, so is not yet final.

b No discriminatory, derogatory or stigmatising language is used



Comment: Legislation uses the terms 'buggery', 'indecency', 'unnatural' (e.g. ss 13, and 16 SOA).

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



Comment: Young people engaging in consensual same-sex sexual activity with their peers are excluded from the close-in-age defences (s 20 Children Act.).

Endnotes

- 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-the-commonwealth-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> |> (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/basic-texts>> (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-the-elimination-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 <http://www.pilonsec.org/images/stories/PLGED_intros.pdf>.
- 11 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-on-violence-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/mese cvi/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](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/pacific-sisters-with-disabilities/>> (accessed January 2020).

- 25 For detailed information on countries that criminalise consensual same-sex sexual activity please see www.humandignitytrust.org.
- 26 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,47fdaf7d.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).
- 28 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 Strømme, *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).
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