



Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth

Acknowledgements

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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 UK Prime Minister Theresa May announced that as Chair-in-Office of the Commonwealth the UK would support Commonwealth governments that want to reform their laws that discriminate against

women and girls and lesbian, gay, bisexual and transgender (LGBT) people, many of which are a colonial legacy. The Equality & Justice Alliance was formed to provide this support during the period April 2018 to March 2020, with funding from the UK Foreign and Commonwealth Office in support of the commitments made during CHOGM 2018.

About the Human Dignity Trust

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

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About this Study

1. Overview

- 1.1 The purpose of this study is to inform, inspire and aid reform of discriminatory and harmful laws on sexual offences in member states of the Commonwealth. The study will assist Commonwealth countries that are seeking to reform their sexual offences laws by providing models of 'good practice' laws from other Commonwealth countries across all regions of the world. While this report is not a technical or legislative drafting guide, it provides technical support and encouragement for countries that are beginning the process of undertaking the necessary legislative reform to bring certain categories of sexual offences laws into compliance with international human rights law for the better protection of their citizens and societies.
- 1.2 The focus of the report is on four areas of sexual offences laws, namely rape/sexual assault, age of consent for sexual conduct, treatment of consensual same-sex sexual activity between adults, and sexual offences in relation to people with disability.
- 1.3 Outdated and discriminatory laws in these areas, many of which originate in colonial-era penal codes, continue to operate in many member states of the Commonwealth. For example, in many countries the rape/sexual assault laws continue to:
 - discriminate on the basis of sex, gender, sexual orientation, gender identity or disability,
 - permit rape/sexual assault in marriage,
 - require corroboration by a third party,
 - exclude oral rape, anal rape, and rape/sexual assault with objects, and/or
 - exclude rape/sexual assault of men and boys.
- 1.4 Laws prescribing the age of consent for sexual conduct which differentiate between people on the basis of their sex, gender, sexual orientation or gender identity are also prevalent. These laws add to the harmful effects of discriminatory sexual offences provisions and perpetuate discrimination and violence against women and girls, and lesbian, gay, bisexual, transgender and other gender non-conforming (LGBT+) people.
- 1.5 Many countries also criminalise consensual sexual activity with people with disability. While the motivation for these laws may be to protect people with disability from sexual abuse and exploitation, the blanket criminalisation is

paternalistic, and denies people with disability enjoyment of their fundamental human rights, including to legal autonomy and freedom from discrimination. Some laws also still contain derogatory colonial-era language, such as ‘imbecile’ or ‘idiot’ in referring to people with disability.

- 1.6 Nearly half of the 72 jurisdictions in the world that still criminalise consensual same-sex sexual activity between adults in private are members of the Commonwealth (34 countries plus the New Zealand associate jurisdiction of the Cook Islands), most of which inherited these Victorian-era laws from British colonial powers.
- 1.7 Discriminatory sexual offences laws continue to cause untold harm in all aspects of the lives of those individuals affected by them. They are at odds with international and regional human rights norms, as well as most national constitutions. They undermine the enjoyment of a wide range of human rights, and perpetuate violence, stigma and discrimination. They particularly affect women, children, LGBT+ people, people with disability, and other marginalised groups, such as First Nations² peoples. They also undermine the health and prosperity of entire societies. For example, the United Nations has called rape a global ‘pandemic’,³ and human rights compliant rape laws are critical to properly preventing, punishing and protecting against it. Many married women in many countries around the world are wholly unprotected from sexual violence in their own homes, and have little or no control over their own sexual and reproductive health. Laws that criminalise LGBT+ people put them outside the protection of the law, fostering a climate of fear and stigma in which discrimination, exclusion, harassment, and physical and sexual violence are commonplace. People with disability continue to be denied legal autonomy by laws that assume a lack of ability to consent to and enjoy sexual activity.

The law is an important means available to a society to demonstrate that certain behaviours are unacceptable, and to hold [violators] to account.

A Framework to Underpin Action to Prevent Violence Against Women, UN Women, 2015

- 1.8 A country’s laws, if they are non-discriminatory and enforced consistently and fairly, can play a vital role in protecting people equally, deterring people from committing offences, providing redress for those affected by violations, and eliminating stigma and abuse of vulnerable or marginalised groups. They can also protect and guarantee fundamental human rights, and encourage shifts in attitude and behaviour at a societal and cultural level. On the other hand, if laws are discriminatory or unfair, either on paper or in their application, they can cause harm to individuals, communities and whole societies, as well as to the rule of law itself. For example, a discriminatory rape law will deter victims/survivors from coming forward and reporting the crime. Discriminatory rules of evidence can re-traumatise victims/survivors and deny them access to justice while the perpetrator is not held to account. Differential treatment of different

victims/survivors of sexual abuse can send a signal that some people are less worthy of equal protection, leaving them more exposed to abuse.

- 1.9 Several countries in the Commonwealth have updated their sexual offence laws to remove their discriminatory impact and language, for example, defining rape/sexual assault in gender-neutral terms, eliminating marital rape exemptions, applying consent-based (rather than act-based or personal characteristic-based) legal frameworks for sexual activity, and equalising the age of consent regardless of sex, gender or sexual orientation. These are the laws highlighted in this study.
- 1.10 Reform of (largely) colonial-era sexual offence laws has been a slow and incremental process around the Commonwealth, and is not yet complete in most countries. The laws assessed as good practice models for the purposes of this study meet fundamental criteria based on international human rights standards. However, they may not be perfect, and there are often different options for human rights compliant sexual offences laws, which is why we refer to 'good practice' laws rather than 'best practice' laws.
- 1.11 This study uses international human rights law as the benchmark for assessing a law, and describes the international legal norms relevant to sexual offences. The rationale used in this report for applying international human rights law is explained below.

2. Background

- 2.1 This research was commissioned by the Human Dignity Trust (the Trust), as part of its work with the Equality & Justice Alliance⁴—a two-year programme announced by the UK Government at the April 2018 Commonwealth Heads of Government Meeting (CHOGM) in London by UK Prime Minister Theresa May.⁵ In offering UK support for Commonwealth governments that want to reform discriminatory laws, the Prime Minister said:

Across the world, discriminatory laws made many years ago continue to affect the lives of many people, criminalising same-sex relations and failing to protect women and girls. I am all too aware that these laws were often put in place by my own country. They were wrong then, and they are wrong now. [...] I deeply regret both the fact that such laws were introduced, and the legacy of discrimination, violence and even death that persists today.

As a family of nations, we must respect one another's cultures and traditions. But we must do so in a manner consistent with our common value of equality, a value that is clearly stated in the Commonwealth charter. [...]

[T]he UK stands ready to support any Commonwealth member wanting to reform outdated legislation that makes [...] discrimination possible.⁶

- 2.2 A core focus of the two-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 such laws. The research is Commonwealth-focused, enabling member states to learn from other countries in the Commonwealth that have already successfully undertaken reforms.
- 2.3 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 various Commonwealth countries, which will be available on the Trust's website as they are completed.⁷

3. Scope

- 3.1 The focus of this study is on good practice legislation in the following four main areas of law:
1. rape/sexual assault,⁸
 2. age of consent for sexual conduct,
 3. treatment of consensual same-sex sexual activity between adults, and
 4. sexual offences in relation to people with disability.
- 3.2 We consider a representative sample of sexual offences laws from Commonwealth jurisdictions across each of the Commonwealth's five regions: Africa, Asia, Caribbean and the Americas, Europe, and the Pacific. Where appropriate, the study also considers relevant common law developments. Sample good practice laws from the following jurisdictions are included in this study:
- Tasmania (Australia)
 - Belize
 - Canada
 - England and Wales
 - Fiji
 - Guyana
 - India
 - Namibia
 - Seychelles
 - Solomon Islands
 - South Africa
- 3.3 This report does not purport to be a comprehensive survey of every good practice law on sexual offences in the Commonwealth. There will be examples of good

practice sexual offences laws in other Commonwealth countries not covered in this report. Equally, there are certain categories of sexual offences laws that are outside the scope of this report and are therefore not covered. For example, this report does not address laws criminalising sex work/prostitution; this is a major area of study in its own right. Similarly, we do not consider adultery laws, though discriminatory framing of such laws still exists in some Commonwealth countries. Incest laws and domestic/family violence laws are not covered in detail, while 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.

3.4 It is important to emphasise that laws, no matter how “good” they may be from a legal and human rights perspective, will not be effective without implementation and a range of complementary and interdependent legislative and non-legislative measures, including:

- supportive and complementary policies in areas such as health, social welfare and policing;
- ongoing training of the justice, law enforcement, health, child protection and social support sectors;
- the provision of sufficient financial and human resources for law enforcement and implementation, including for the court system;
- measures for effective and equal access to the formal justice system, including access to appropriate and affordable legal representation;
- an integrated data collection programme on the various kinds of victims and perpetrators of crime and the impact of the laws; and
- support for a broad-spectrum approach to increase legal literacy and address discriminatory attitudes and practices at the community level.

3.5 These critical measures are outside the scope of this report, which focuses on the law itself as a structural imperative from which other measures can and must flow.

4. Methodology

4.1 The research for this study was conducted through literature and legislation reviews and interviews with key stakeholders in the representative sample countries. Desk-based research focused on specific sexual offences laws, a literature search to identify baseline good practice standards for sexual offence legislation, and identification of international and regional legal standards on sexual offences in:

- international and regional treaties;
- commentary from treaty bodies;
- state practice;

- international policy statements (such as the Beijing Platform for Action and the Yogyakarta Principles and Yogyakarta plus10 Principles);⁹ and
- expert guidance on human rights compliant sexual offences legislation (such as the UN *Handbook on Legislation for Violence Against Women* 2010 (the **UN Handbook**)).¹⁰

- 4.2 A series of interviews with key stakeholders provided critical technical and contextual information, focusing particularly on rape/sexual assault and the decriminalisation of consensual same-sex sexual activity. The interviews were semi-structured and took place via telephone or Skype. We interviewed people from three primary cohorts: (1) government, including the justice sector; (2) academic, legal and other experts; and (3) civil society.
- 4.3 Criminal legislation dealing with sexual conduct and people with disability¹¹ is an important topic that is often overlooked when considering reform of sexual offences laws. Outdated and paternalistic attitudes to people with disability remain widespread. Our research on this topic focused on the scholarship and did not include interviews. However, we see this as a crucial area for further, dedicated research and law reform advocacy.

5. Structure of the report

- 5.1 The report is divided into two parts. Part A describes and explains the criteria used in this study to assess if a particular law is a good practice law based on its human rights compliance. Part B sets out case studies of good practice laws drawn from across the Commonwealth's five regions. The country case studies include a brief description of the current law, and how reforms changed the previous outdated law. Where information was available, we have also included a summary of the law reform process and an overview of the extent to which the law is being implemented and enforced, highlighting any challenges to effective implementation or enforcement. Charts for each country case study show how the law measures up against the benchmark criteria for a good practice law in that area.
- 5.2 It is important to note that the country case studies are based on laws that are publicly available online. To the extent possible, we have verified that the laws referred to are the most up-to-date. It is also important to note that the country case studies do not purport to be comprehensive analyses of a country's laws.
- 5.3 The report also contains the following annexures:
1. Glossary
 2. Timeline of decriminalisation in the Commonwealth.

-
- 1 The authors adopt the term 'LGBT+' throughout this report, as it is the most inclusive term to encompass people of every sexual orientation and gender identity, including people who do not identify with any gender, however described or named.
 - 2 First Nations peoples are sometimes referred to as 'Indigenous' or 'Aboriginal' peoples.
 - 3 Ban Ki Moon, 'Remarks on the International Day for the Elimination of Violence against Women' (Speech delivered at the UN Headquarters, New York, 25 November 2014) <<https://www.un.org/sg/en/content/sg/speeches/2014-11-25/remarks-international-day-elimination-violence-against-women>> (last accessed March 2019).
 - 4 The other organisations of the Alliance are the Kaleidoscope Trust, The Royal Commonwealth Society, and Sisters for Change.
 - 5 The Human Dignity Trust (2019) <<http://www.humandignitytrust.org/pages/NEWS/News?NewsArticleID=578>> (last accessed March 2019).
 - 6 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 March 2019).
 - 7 The Human Dignity Trust (2019) Resources <<https://www.humandignitytrust.org/hdt-resources/>> (last accessed March 2019).
 - 8 In this report, we use the term 'rape/sexual assault' when referring to non-consensual physical assaults of a sexual nature.
 - 9 Declaration on the Elimination of Violence against Women, GA Res 48/104, UN GAOR, 48th sess, 85th plen mtg, Agenda Item 111, UN Doc A/RES/48/104 (20 December 1993). Another important policy statement for example is the Beijing Platform for Action, adopted at the Fourth World Conference on Women in Beijing in 1995, Report of the Fourth World Conference on Women, Beijing, China, 4-15 September 1995. About the Yogyakarta Principles (2016) < <http://yogyakartapinciples.org/principles-en/about-the-yogyakarta-principles/>> (last accessed May 2019), and Yogyakarta Principles plus 10 (2016) < <https://yogyakartapinciples.org/principles-en/yp10/>> (last accessed May 2019).
 - 10 UN Women, *Handbook for Legislation on Violence against Women* (2012) (UN Handbook) <<http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women>> (last accessed March 2019).
 - 11 The United Nations, in the Convention on the Rights of Persons with Disability (see n20 for full details), adopts terminology that puts the person first, i.e., people, persons or person with disability or disabilities. This 'person first' approach is reflected within the Commonwealth in, for example, Australian, Canadian, Indian and Rwandan disability rights advocacy. An alternative terminology, based on similar underpinning principles, is 'disabled person' or 'disabled persons' or 'disabled people'. This approach is reflected within the Commonwealth in, for example, England, New Zealand and Fiji. This report adopts the UN terminology of 'person ...', 'persons ...' or 'people with disability'.

Part A:

Analytical Framework for Identifying a 'Good Practice' Law

Part A describes the general principles applied to assessing whether a law is a 'good practice' law from a human rights perspective. The Part covers general criteria and criteria specific to each of the four areas of law addressed in the report. Each section on specific criteria contains a summary list of the relevant criteria, and briefly explains the international law sources of these. These criteria are then used in the country case studies in Part B.

6. International human rights law as the benchmark

6.1 The analysis of laws as good practice models in this report is based on a set of benchmark criteria drawn from international human rights law.¹² International human rights law provides a clear and binding prescription for legislating effectively on sexual offences, and includes protections that must be addressed in each area of law. These include guarantees of:

- equality before the law and equal protection of the law,
- freedom from discrimination in the enjoyment of all fundamental rights,
- respect for human dignity,
- 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.

6.2 All countries, including members of the Commonwealth, are bound under international law to respect, protect and fulfil these rights for their citizens, either as states parties to the international and regional treaties in which these norms are set out, or under customary international law.¹³ This obligation includes taking legislative and other measures to guarantee these rights and freedoms. For example, the *International Covenant on Civil and Political Rights (ICCPR)*¹⁴ states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.¹⁵

This same requirement can be found in all international and regional human rights treaties.¹⁶

6.3 The underlying fundamental principles applied to laws in this study are derived from the *Universal Declaration of Human Rights (UDHR)* as subsequently detailed in the following human rights treaties:

United Nations

- *International Covenant on Civil and Political Rights (ICCPR)*,
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*,¹⁷
- *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*,¹⁸
- *Convention on the Rights of the Child (CRC)*,¹⁹
- *Convention on the Rights of Persons with Disabilities (CRPD)*.²⁰

Regional

- *African Charter on Human and Peoples' Rights (ACHPR)*,²¹
- *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*,²²
- *American Convention on Human Rights (ACHR)*,²³
- *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*,²⁴ and
- *Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)*.²⁵

Deriving criteria from international human rights law

- 6.4 Human rights treaties use the language of 'obligations' on states parties, and of the 'rights' of individuals to be protected, respected and fulfilled by states. It is possible to derive from these obligations and rights a set of benchmarks that states must meet in their laws (and policies) relating to sexual offences.
- 6.5 Treaty body committees, regional human rights courts and national courts have elaborated on and clarified the scope and meaning of many treaty principles. Expert agencies at the UN and at the regional level have further distilled this guidance into practical advice, including model legislation, on how to make human rights compliant laws in some areas, such as on rape/sexual assault.²⁶ This guidance has also informed the criteria used to assess the sexual offence laws in this report.
- 6.6 Underscoring each of the criteria identified in this study are the fundamental human rights principles of substantive equality and respect for the inherent dignity of every person. These principles are the foundation of human rights, and are expressed in all human rights treaties. For a law to be assessed as a good practice law, it must adhere to these core principles.

- 6.7 It follows that sexual offences laws must be non-discriminatory, must protect an individual from harm, and must respect their personal agency and bodily integrity. Where laws create criminal offences, they should appropriately balance the competing interests of the rights of an accused person to a fair trial with the rights of a complainant.

CORE PRINCIPLES FOR A GOOD PRACTICE SEXUAL OFFENCES LAW

Respects human dignity

Ensures substantive equality

Does not discriminate

Protects personal agency & bodily integrity

- 6.8 The next section identifies and describes the human rights-based criteria necessary for a good practice law in each of the areas of law covered in this report.

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- 12 International human rights law is dynamic and evolving, and the standards for the protection of rights, as well as the content of those rights, has developed over time. In our analysis of national laws for this study, we have applied the most up-to-date articulations and interpretation of international human rights norms and standards.
- 13 For example, the prohibition of gender-based violence; Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 35 on violence against women, updating general recommendation 19*, 67th sess, UN Doc CEDAW/C/GC/35 (26 July 2017) <https://tbinetnet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/35&Lang=en> (last accessed March 2019).
- 14 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, GA Res 2200A (XXI), 999 UNTS 171, UN Doc A/6316 (1966) (entered into force 23 March 1976). <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND>. Forty-two Commonwealth countries have ratified or acceded to the ICCPR, with a further four having signed but not yet ratified. This represents 87% of Commonwealth countries having adopted the full suite of states party obligations.
- 15 Ibid art 2.2.
- 16 For example, *Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*, opened for signature 1 March 1980, 1249 UNTS 13, (entered into force 3 September 1981) art 2 <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en>. Fifty-two Commonwealth countries have ratified or acceded to CEDAW. This represents 98% of Commonwealth countries having adopted the full suite of states party obligations; *Convention on the Rights of the Child (CRC)*, opened for signature 1 March 1980, 1577 UNTS 3, (entered into force 2 September 1990) art 4 <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en>. Fifty-three Commonwealth countries have ratified or acceded to the CRC. This represents 100% of Commonwealth countries having adopted the full suite of states party obligations; *American Convention on Human Rights*, art 2.
- 17 *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), 993 UNTS 3, UN Doc A/6316 (1966) (entered into force 3 January 1976) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en>. Thirty-nine Commonwealth countries have ratified or acceded to the ICESCR. This represents 74% of Commonwealth countries having adopted the full suite of states party obligations.
- 18 CEDAW, above n16, art 1.
- 19 CRC, above n16.
- 20 *Convention on the Rights of Persons with Disabilities (CRPD)*, opened for signature 30 March 2007, 2515 UNTS 3, (entered into force 3 May 2008) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en&clang=en>. Forty-six Commonwealth countries have ratified or acceded to the CRPD. This represents 87% of Commonwealth countries having adopted the full suite of states party obligations.
- 21 Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights (Banjul Charter)* 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) <<https://www.refworld.org/docid/3ae6b3630.html>> (last accessed March 2019).
- 22 African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, (Maputo Protocol)* 11 July 2003 <<https://www.refworld.org/docid/3f4b139d4.html>> (last accessed March 2019).
- 23 Organization of American States (OAS), *American Convention on Human Rights (Pact of San José)*, Costa Rica, 22 November 1969 <<https://www.refworld.org/docid/3ae6b36510.html>> (last accessed March 2019).
- 24 Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)* 9 June 1994 <<https://www.refworld.org/docid/3ae6b38b1c.html>> (last accessed March 2019).

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- 25 Council of Europe, *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, November 2014, ISBN 978-92-871-7990-6 <<https://www.ref-world.org/docid/548165c94.html>> (last accessed March 2019).
- 26 For example, UN Handbook, above n10; 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> (last accessed March 2019); Southern Africa Development Community (**SADC**) Parliamentary Forum, *Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage* (2016) <<https://www.girlsnotbrides.org/wp-content/uploads/2016/10/MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf>> (last accessed March 2019).

7. Rape/sexual assault laws

TERMINOLOGY

In this report, we use the term **rape/sexual assault** when referring to non-consensual physical assaults of a sexual nature. This includes the crime of sexual penetration (however slight) that is commonly referred to as 'rape', unlawful 'sexual intercourse', or 'carnal knowledge'. Other terms used elsewhere may include 'offences against modesty' or, in the case of sexual offences against children, the crime of 'defilement' (often limited to girls). It also includes other sexual assault that is not penetrative, such as 'indecent assaults', for example, non-consensual touching of a sexual nature, or forcing a person to watch a sexual act.

In the majority of jurisdictions in the Commonwealth, there are separate offences for rape and other forms of sexual assault that do not involve any penetration. However, a small number of jurisdictions have one offence of 'sexual assault' which contains offences of varying degrees of severity. In these jurisdictions, rape is one form of sexual assault, e.g., Canada.²⁷

- 7.1 The United Nations has called violence against women and girls, which includes rape and sexual assault:²⁸

a global pandemic that destroys lives, fractures communities and holds back development. It is not confined to any region, political system, culture or social class. It is present at every level of every society in the world. It happens in peacetime and becomes worse during conflict.²⁹

- 7.2 Any person of any age, from infants to the elderly, may find themselves the victim of rape/sexual assault. However, rape/sexual assault predominantly affects women and girls. Global estimates by the World Health Organisation (**WHO**) indicate that about a third (35%) of women worldwide have experienced physical violence, including sexual violence, from their partners or other family members in their lifetime.³⁰ Certain women and girls face heightened risk of sexual violence, including First Nations women, LGBT+ women, women who are homeless, and sex workers. Women (and other people) with disability also face an increased risk of rape/sexual assault and other forms of violence. Members of these groups are also less likely to have effective or equal access to justice, to medical and psychosocial health services, or to other social supports.³¹
- 7.3 Violence against women and girls is a systematic violation of fundamental human rights and an ongoing form of gender-based discrimination.³² It is also a significant social and economic problem everywhere, holding back development in all sectors,³³ and a serious but preventable public health issue—the WHO has declared it to be a 'leading worldwide health problem in every region of the world'.³⁴ Its elimination is an explicit Sustainable Development Goal.³⁵

- 7.4 Men and boys can also be victims of rape/sexual assault. A major oversight of many sexual offences laws in the Commonwealth is that rape/sexual assault provisions do not capture male rape. Instead, it must be prosecuted under 'buggery' laws or similar, which carry different maximum sentences and different evidentiary burdens. This type of regime fails to protect people from rape and sexual abuse equally, regardless of their sex or gender.

Rape myths and the law

- 7.5 The primary causes of rape/sexual assault and other forms of violence against women and girls are gender inequality and discrimination, as well as harmful cultural and social beliefs and practices.³⁶ While the past half century has seen significant reforms to rape and sexual assault laws in many countries, others retain archaic laws that reflect inequality and perpetuate false, discriminatory and damaging myths about rape and about victims/survivors and perpetrators.³⁷ These myths cause harm and undermine the criminal justice system. They prevent or deter people from reporting rape/sexual assault, they expose survivors to re-traumatisation, they shield perpetrators from justice, and they restrict or prevent access to justice for victims/survivors.³⁸ They exist only to blame the victim/survivor for what has happened, and give excuses to the perpetrator for their actions and behaviour.
- 7.6 Some of the most enduring and pervasive rape myths underlying many rape/sexual assault laws follow:

FIGURE 1: Myths underlying discriminatory rape/sexual assault laws

Women lie about rape

This myth is the basis for the common law **'fresh-complaint'** doctrine (or the 'hue and cry' rule), as well as the 'corroboration rule'.

The fresh-complaint doctrine allows a negative inference to be drawn from evidence that the victim delayed reporting the rape. The rule has its origins in 18th century England.

*By the beginning of the eighteenth century, a failure to complain immediately [of sexual assault] had evolved into a presumption of fabrication on the part of the rape complainant. Since the rule was based on 'the belief that a rape complainant could only be believed if she could demonstrate she had publicly denounced the perpetrator, rape complainants became a special category of witness whose credibility could be boosted by evidence of recent complaint'.*³⁹

The **rule on corroboration**, which is an exception to the hearsay rule, requires a third party to corroborate the complaint of the rape/sexual assault victim/survivor, who, as a woman, cannot be trusted.

*[...] human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.*⁴⁰

The corroboration rule was abolished in the UK by the Privy Council in *R v Gilbert* [2002], with the Privy Council deciding that warnings in sexual offences cases are a matter of discretion for the judge based on the particular facts of the case.

Both common law rules are discriminatory, since they are not applicable in other criminal cases, and because they assume it is natural for a woman to confide in someone immediately following a sexual assault. If she fails to do so, the only rational explanation is that she was lying and that no offence has been committed.⁴¹

‘Chaste’ or ‘nice’ women cannot be raped, or rape is the victim/survivor’s fault

This is one of the most pervasive rape myths. It is reflected in rules of evidence that, for example, allow the defence to question the character or reputation of the victim, including her sexual reputation, allow an inference of consent of the victim to be drawn from evidence of prior sexual conduct by the victim, from the clothing the victim was wearing at the time of the attack, her behaviour at the time of the assault, such as whether she was drunk, or her reaction during and after the assault.

Husbands can’t rape their wives

The ‘**marital rape immunity**’ is very common in Commonwealth jurisdictions. It exempts husbands who rape their wives from criminal liability on the false assumption that wives cannot be raped because they are the property of their husbands and consented upon marriage to all sexual acts with him. Even where rape law reform has occurred, some countries, including as recently as 2006, have chosen to retain this exception in breach of international human rights law.⁴²

*[...] the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.*⁴³

Much of the scholarship on marital rape immunity attributes the immunity to this remark in 1736 by the British judge and jurist Sir Matthew Hale. In his view, it was legally impossible to rape one’s own wife as she had consented to every act of sex, for all time, as part of her agreement to marry. It was this irrevocable consent that has been used as justification for immunity for rape in marriage. Unfortunately, this became part of the common law that the UK exported around the world to its colonies and remains in use in many countries.⁴⁴ It was overturned in English law in 1992 by the House of Lords in *R v R* [1992] 1 AC 599.

Only women and girls can be raped

It is still common in the Commonwealth for rape to be conceived in law (and in common understanding) as a crime that can only be committed by a male against

a female. This is reflected in the language used, as well as in the definition of the crime in many countries, that rape is sexual intercourse or conduct involving only the penetration of a vagina by a penis. This excludes rape of men and boys, as well as other forms of sexual assault involving non-consensual/forced penetration of a sexual nature, such as oral rape or rape with objects.

Rape is always accompanied by violence, so there will always be visible injuries

People often submit to an unwanted sexual act because they are afraid of being hurt or killed, the perpetrator threatens someone else, the perpetrator is in a position of authority or trust, such as a family member, religious leader or teacher, or for many other reasons. Women may be in an ongoing coercive and controlling environment with an abusive intimate partner.

Mere submission or acquiescence to the sexual activity is not consent. Consent must be a free, voluntary, active and ongoing agreement to the sexual activity. There are no 'correct' ways to react to a sexual assault, although there remain many discriminatory assumptions prevalent in the law and its practice.

Lesbian and bisexual women can be 'cured' by having forced sex with a man

In some Commonwealth countries, lesbian and bisexual women are subjected to rape, often at the hands or under the direction of their own family members, in an attempt to 'cure' their homosexuality in the mistaken belief that it is something that can be altered, to teach them a lesson that homosexuality is not acceptable, and/or to control women's sexuality and maintain gender hierarchies.

- 7.7 Each of these rape myths, and the many others not listed here, support cultures in which violence against women and girls, including LGBT+ women and women with disability, is endemic, and impunity for rape and sexual assault is the norm. They cause further harm to victims/survivors, their families and ultimately their communities while failing to protect fundamental rights.

Progress of reforms

- 7.8 Despite sometimes significant progressive reforms, these and other discriminatory myths about rape/sexual assault continue to undermine accountability, because even when they have been explicitly rejected in the law itself, they can persist in the minds of law enforcement officers, prosecutors, jurors, judges and magistrates, the public, the media, perpetrators, and victims/survivors themselves. In recognition of this, there has been a lot of work done developing policies, operating procedures and training for law enforcement and justice sector actors (e.g., judges, magistrates, prosecutors, voluntary court support workers) in relation to sexual violence at the national and regional levels.⁴⁵

FIGURE 2: Examples of positive reforms in the Pacific region

Positive reforms in the Pacific region

Some Commonwealth jurisdictions in the Pacific—for example, Fiji, Papua New Guinea (PNG) and Solomon Islands—have made significant reforms to their sexual assault offences in recent years, including removing the marital rape exemption.⁴⁶

Important changes have also been made to rules for legal proceedings and evidence, which has improved court processes for complainants. In particular:

- the **corroboration rule has been abolished** in the Cook Islands, Fiji and Solomon Islands, and partially abolished in Kiribati;
- **consent must be proved by the defendant** rather than disproved by the complainant, such as in Fiji;
- **submission** of the complainant **does not imply consent**;
- in some jurisdictions, **special court arrangements** are made for vulnerable complainants giving evidence, such as in Solomon Islands and Fiji.⁴⁷

(See country case studies on Fiji and the Solomon Islands in Part B of this report.)

Sources for the criteria for good practice: Rape/sexual assault laws

*Over the past two decades, violence against women has come to be understood as a form of discrimination and a violation of women's human rights. Violence against women, and the obligation to enact laws to address violence against women, is now the subject of a comprehensive legal and policy framework at the international and regional levels.*⁴⁸

- 7.9 The general criteria of equality and non-discrimination set out above are the foundation for good practice laws on rape/sexual assault. Most countries guarantee these foundational rights in their national constitutions. At the same time, international and regional human rights laws elaborate on how these guarantees are to be implemented at the national level in relation to rape/sexual assault.
- 7.10 Reflecting the reality that rape/sexual assault disproportionately affects women and girls, the obligation on countries to legislate effectively, and to take other measures to prevent and punish rape/sexual assault in particular, is most often articulated in international law specifically addressing women's human rights. However, the detailed norms they establish apply regardless of the sex or gender of a victim/survivor. The principal treaties on women's human rights are:

International – CEDAW

7.11 Under Article 3, CEDAW requires states parties to take:

all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

7.12 CEDAW does not define violence against women and girls. However, the CEDAW Committee has confirmed that it constitutes unlawful discrimination under the treaty, including in its General Recommendation 19 on violence against women,⁴⁹ and General Recommendation 35, which updated General Recommendation 19.⁵⁰ Therefore, states parties to CEDAW have a legal obligation to prevent and respond to all forms of violence against women, including sexual violence, and to provide remedies to victims/survivors.

Americas – Convention of Belém do Pará:

7.13 This was the first international treaty directed solely at the elimination of violence against women. Established by the Organisation of American States, it sets out the right of women to live a life free of violence, and that violence against women, including rape, constitutes a violation of their human rights and fundamental freedoms.

7.14 Articles 1 and 2 define violence against women as ‘any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere’.

7.15 It contains detailed provisions requiring member states to enact laws, including:

- to prevent, punish and eradicate violence against women;
- to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
- to amend or repeal existing laws, regulations, legal and customary practices that sustain the persistence and tolerance of violence against women;
- to establish fair and effective legal procedures for victims/survivors, such as protective measures, a timely hearing, and effective access to such procedures; and
- to establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations, or other just and effective remedies.

Africa – Maputo Protocol:

- 7.16 The Maputo Protocol seeks to address the human rights violations for which women and girls are uniquely or disproportionately targeted. It addresses violence against women in many of its provisions. For example, article 1 defines ‘violence against women’ as including all harmful physical, sexual, psychological, and economic acts, as well as the ‘imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during armed conflict or war’.
- 7.17 It also requires member states to enact and enforce laws:
- to prohibit all forms of violence against women, including unwanted or forced sex, whether the violence takes place in private or public;
 - to prevent, punish and eradicate all forms of violence against women;
 - to provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women; and
 - to specifically address rape and other violence against women seeking asylum, older women, and women with disability.

Council of Europe – Istanbul Convention:

- 7.18 This is the most recent treaty on violence against women and girls, established under the Council of Europe, and is an important benchmark for ‘good practice’ rape laws.⁵¹
- 7.19 Article 3 defines ‘violence against women’ as ‘a violation of human rights and a form of discrimination against women’ and includes all harmful acts of physical, sexual, psychological or economic gender-based violence, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private.
- 7.20 It specifies all the areas in which member countries must make and implement laws on violence against women, including the following:
- elements for sexual violence offences:
Article 36 – Sexual violence, including rape
- (1) Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:
- (a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
 - (b) engaging in other non-consensual acts of a sexual nature with a person;
 - (c) causing another person to engage in non-consensual acts of a sexual nature with a third person.

- (2) Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
 - (3) Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.
- excluding culture, custom, religion, tradition or "honour" as justifications for violence:

Article 42 - Unacceptable justifications for crimes, including crimes committed in the name of so-called "honour"

- (1) Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.
- criminalising rape (and other violence), regardless of the relationship between the perpetrator and victim/survivor, including in marriage and marriage-like relationships:

Article 43 – Application of criminal offences

The offences established in accordance with this Convention shall apply irrespective of the nature of the relationship between victim and perpetrator.

- penalties:

Article 45 – Sanctions and measures

- (1) Parties shall take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness. These sanctions shall include, where appropriate, sentences involving the deprivation of liberty which can give rise to extradition.

Article 46 – Aggravating circumstances

Parties shall take the necessary legislative or other measures to ensure that the following circumstances, insofar as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence in relation to the offences established in accordance with this Convention:

- (a) the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority;

- (b) the offence, or related offences, were committed repeatedly;
- (c) the offence was committed against a person made vulnerable by particular circumstances;
- (d) the offence was committed against or in the presence of a child;
- (e) the offence was committed by two or more people acting together;
- (f) the offence was preceded or accompanied by extreme levels of violence;
- (g) the offence was committed with the use or threat of a weapon;
- (h) the offence resulted in severe physical or psychological harm for the victim;
- (i) the perpetrator had previously been convicted of offences of a similar nature.

→ excluding mandatory mediation or conciliation:

Article 48 – Prohibition of mandatory alternative dispute resolution processes or sentencing

- (1) Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention.

→ limiting the admissibility of evidence of prior sexual conduct of the victim/survivor:

Article 54 – Investigations and evidence

Parties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary.

→ requiring protection of the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings:

Article 56 – Measures of protection

- (1) Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:
 - (a) providing for their protection, [and] their families [...] from intimidation, retaliation and repeat victimisation;
 - (b) ensuring that victims are informed [...] when the perpetrator escapes or is released temporarily or definitively;
 - (c) informing them [...] of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case;

- (d) enabling victims [...] to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;
 - (e) providing victims with appropriate support services so that their rights and interests are duly presented and taken into account;
 - (f) ensuring that measures may be adopted to protect the privacy [...] of the victim;
 - (g) ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible;
 - (h) providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence;
 - (i) enabling victims to testify [...] without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.
- (2) A child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.

Asia/Pacific

- 7.21 Neither Asia nor the Pacific has a regional human rights or women's human rights treaty. However, the Association of Southeast Asian Nations (ASEAN) has adopted the *Declaration on the Elimination of Violence against Women in the ASEAN Region* (2004),⁵² which does not specifically reference rape/sexual assault but provides non-binding guidance to ASEAN countries on taking legislative and other measures to address violence against women and girls in general. ASEAN countries report back to the annual Leaders' Meeting on their progress.
- 7.22 In the Pacific region, the *Pacific Leaders Gender Equality Declaration 2012* calls on countries in the region:
- to incorporate CEDAW into national law,
 - to '[e]nact and implement legislation regarding sexual and gender-based violence to protect women from violence',
 - to 'impose appropriate penalties for perpetrators of violence', and
 - to '[i]mplement [...] essential services (protection, health, counselling, legal) for women and girls who are survivors of violence'.⁵³
- 7.23 In 2017, the 13th Triennial Conference of Pacific Women and 6th Meeting of Ministers for Women in the Pacific agreed on a new *Pacific Platform for Action on Gender Equality and Women's Rights (2018–2030)*.⁵⁴ The Pacific Platform for Action has four pillars, one of which is specifically directed at ensuring that 'policies and legislation for the promotion of gender equality and women's human rights are adopted and strengthened'. It also adds to the *Pacific Leaders Gender Equality Declaration 2012* by calling on states to address 'social norms and dynamics that perpetuate violence against women and girls'.⁵⁵

Other sources

- 7.24 Other UN and regional human rights treaties also protect against sexual violence, for example, as unlawful discrimination, or as a violation of the right not to be subjected to torture or other cruel, inhuman or degrading treatment. These include the ICCPR, CAT, CRC, CRPD, ACHPR, ACHR and, in the context of armed conflict, the 1949 Geneva Conventions and Additional Protocols.

FIGURE 3: Expert treaty bodies call for reform of sexual offences laws

Expert treaty bodies call for reform of sexual offences laws

The CEDAW Committee has addressed reform of national laws on sexual violence in many countries, including, for example, confirming that exemptions of spouses from rape laws, so-called ‘marital rape exemptions’, are inconsistent with states’ legal obligations under CEDAW.

For example, in its concluding observations on Kenya’s 7th Periodic Report under CEDAW in 2011, the Committee urged Kenya to:

*give attention, as a priority, to combating violence against women and girls and adopting comprehensive measures to address such violence, in accordance with its general recommendation No. 19 [...] [and] to expeditiously [reform its **Sexual Offences Act**] to criminalise marital rape and other provisions.*⁵⁶

Kenya reported that this provision would be amended, but no amendment had been made at the time of writing.⁵⁷

How to make a good practice rape/sexual assault law

- 7.25 As mentioned above in the general discussion on human rights law, commentary from the UN and regional human rights bodies provides important advice on the scope and meaning of the rights in the treaties and specific guidance to states on how to protect and fulfil those rights.⁵⁸ For example, the CEDAW Committee has issued two General Recommendations (GR) on violence against women, GR 19 in 1992 and GR 35 in 2017. In GR 19, the CEDAW Committee stated that:

*Gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.*⁵⁹

- 7.26 The Committee also defined discrimination as including sexual harm and other forms of gender-based violence, and advised that gender-based violence impairs or prevents women from enjoying their human rights and fundamental freedoms.⁶⁰

- 7.27 In GR 35, which updated GR 19, the Committee stated that the prohibition of gender-based violence against women has evolved into a principle of customary international law,⁶¹ obliging all countries, whether they have ratified CEDAW or not, to take all legal and other measures necessary to provide effective protection of women against gender-based violence, including effective legal measures and penal sanctions, civil remedies, and compensatory provisions.
- 7.28 In addressing the legislative measures that states should take, the Committee said that they should, among other things:

Ensure that sexual assault, including rape is characterised as a crime against women's right to personal security and their physical, sexual and psychological integrity. Ensure that the definition of sexual crimes, including marital and acquaintance/date rape is based on lack of freely given consent, and takes account of coercive circumstances. Any time limitations, where they exist, should prioritise the interests of the victims/survivors and give consideration to circumstances hindering their capacity to report the violence suffered to competent services/authorities.⁶²

- 7.29 Some UN and regional human rights organisations have taken the treaty-based and customary international norms, as well as the recommendations, advice and decisions of the treaty bodies, to provide road maps for legislative reform. These practical guides describe the specific elements that legislation addressing violence against women must contain to be effective. Of relevance to this study is the *UN Handbook*,⁶³ which includes detailed elements that a human rights compliant sexual assault (or rape) law must include. These elements are reflected in the criteria used in this study.

- 7.30 At the regional level, the 2017 *Guidelines on Combating Sexual Violence and its Consequences in Africa* (the **Niamey Guidelines**),⁶⁴ adopted by the African Commission on Human and Peoples' Rights, is also relevant; as is the *Pacific Island Forum Sexual Offences Model Provisions 2010* (the **Pacific Model Law**), which prescribes two distinct categories of laws on sexual offences:

a penetrative offence is described as a sexual violation. Incest is a sexual violation and will be prosecuted as rape;

a non-penetrative sexual offence is described as sexual assault.⁶⁵

- 7.31 Both regional guidelines draw on the *UN Handbook*. The African Commission has urged all member states of the African Union to incorporate the Niamey Guidelines into their domestic legislation and to 'ensure their effective and rapid implementation'.⁶⁶

Criteria for a good practice rape/sexual assault law

- 7.32 Nine broad criteria for good practice rape/sexual assault laws have been identified from these international legal sources and guidelines. These represent baseline standards, covering:
- the definition of the crime and its scope;
 - the definition of consent to sexual conduct;
 - defences;
 - penalties; and
 - rules of procedure and evidence.
- 7.33 They also include how the crime should be categorised, as well as monitoring implementation of the law and collecting and publishing data on rape from all parts of the justice sector. Monitoring and data collection are critical to ensuring that the law is implemented properly, that government policy related to sexual violence is targeted and effective, and for transparency, which is critical for public trust in, and understanding of, legal and judicial systems.

FIGURE 4: Criteria for good practice: Rape/sexual assault laws

1. Equality and non-discrimination

- a. **Inclusive:** The definition of every sexual assault crime should not exclude anyone. This includes rape, sexual assault, indecent assault, specific sexual offences against children (e.g., defilement and statutory rape offences), gross indecency, and offences against modesty.
- b. **Gender-neutral:** The crimes should be gender-neutral. Any person, regardless of sex or gender, age, sexual orientation or gender identity, or any other characteristic may be the victim/target of rape/sexual assault. The definitions should not exclude any potential victim/survivor, and all victims/survivors should have equal protection.
- c. **No exception for rape/sexual assault in marriage:** The law should clearly state that there is no exception for rape/sexual assault in civil, customary or religious marriages, or marriage-like relationships. Exemptions or immunity for rape in marriage are inconsistent with international law under the ICCPR, CEDAW and CRC.
- d. **No time limits:** Prosecutions for rape/sexual assault should not be statute barred, regardless of the length of time between the alleged offence and the reporting of it to police.

2. Definition of the crimes should not exclude any relevant conduct

- a. **Penetration by body parts and objects:** Any offence criminalising “rape” should capture all types of non-consensual penetration: i.e. of mouth, anus or genitalia by a penis and of anus or genitalia by any other body part or object. “Rape” should not be limited to penetration of a vagina by a penis.
- b. **Penetration, however slight:** The definition should specify that penetration, however slight or of whatever degree, is sufficient for the crime to be made out.
- c. **Other forms of sexual assault:** The law should make clear that all non-consensual sexual conduct constitutes sexual assault.
- d. **Sexual offences against children:** Separate contact sexual offences against children should include all sexual contact with children under the age of consent, subject to close-in-age exceptions.

3. Dignity and respect

- a. **A crime of power and violence, not morality:** The crime of rape/sexual assault, including sexual offences against children, should be categorised as a crime of power and violence against the physical and mental integrity, and sexual autonomy, of the victim/survivor, and not as an offence against morality, modesty, property or honour. The language used in the offences should reflect this.

b. Respectful language: The definition of the crimes and defences available, and laws dealing with sentencing, should use language that is respectful, does not perpetuate negative stereotypes, and is not moralistic or derogatory. For example, it should not:

- **devalue or disparage** people with disability, and should not refer to them as ‘imbeciles’, ‘idiots’ or other derogatory terms;
- **perpetuate gender discriminatory stereotypes or be moralistic.** For example, ‘defilement’ in relation to rape/sexual assault of children is an archaic term meaning ‘to pollute’ or ‘to sully’ and, in the context of sexual offences, refers to sexual assault of minors. It is linked to the cultural and religious importance given to the virginity of unmarried girls in many societies. However, it is a discriminatory term, as it suggests that girls have been ‘spoilt’ or ‘damaged’ by the offence.⁶⁷ Sexual offences against children should use neutral and precise terminology, and be aligned with the language and approach taken in the good practice rape/sexual assault provisions outlined here.

4. Rape/sexual assault is non-consensual

- a. Non-consensual:** Rape/sexual assault should be defined as ‘non-consensual sexual conduct’ (or similar terminology).
- b. Definition of consent:** Consent should be defined to mean ‘unequivocal, free and continuing agreement’ to the sexual conduct.
- c. Submission is not consent:** The law should make clear that passivity or submission by the victim/survivor does not equal consent.
- d. Physical resistance not necessary:** The law should make clear that lack of evidence of physical resistance or lack of evidence of physical injury to the victim/survivor is not, by reason only of that fact, to be regarded as indicating consent to the act.
- e. Circumstances in which consent cannot be given:** The law should give an inclusive list of circumstances in which consent cannot be given. Traditional approaches considered that rape was committed only if force was used, the person was somehow tricked into the act, or they were incapable of understanding the nature of the act due to their age or impairment. This is outmoded and is not good practice. The circumstances need to be much broader and include, for example, where:⁶⁸
 - the person submits because of force threat, or fear of harm of any type to themselves or another;
 - the person submits because they are unlawfully detained;
 - the person is asleep or unconscious, for example due to alcohol or drugs, so is incapable of freely agreeing;
 - the person is incapable of understanding the nature of the act;
 - the person is mistaken about the nature of the act, e.g., that it is for medical purposes or spiritual wellbeing;

- the person is mistaken about the identity of the other person;
- the person submits out of respect or fear due to another person's position of authority, trust or responsibility;
- the person is under the coercive control of the other person;
- the person submits because of threats to shame, degrade or humiliate them or another;
- the person is a child;
- the person withdraws consent during the act after initially consenting to it.

5. Available defences

- Honest but mistaken belief in consent or age:** The law should limit the common law mistake of fact defences of honest but mistaken belief in consent and honest but mistaken belief in age (where the victim is under the age of consent) to situations where the accused can point to evidence indicating that they took reasonable steps to ascertain consent or age, as the case may be.
- No defence of provocation:** The law should not allow defences of provocation (e.g., adultery or suspected adultery), honour, punishment, passion, or so-called "corrective" rape of lesbians, bisexual women or trans men.

6. Rules of evidence and procedure to protect rights of complainant and accused

- Rules of evidence** in criminal proceedings for rape/sexual assault should make clear that:
 - evidence of a delay before reporting an alleged rape/sexual assault cannot be used to draw a negative inference about the truthfulness of the complaint (the 'no fresh complaint' rule);
 - corroboration by a third party of the victim/survivor's testimony is not required;
 - the prosecution and defence are equal in the evidence they can lead and the weight given to that evidence; and
 - evidence of a complainant's prior sexual conduct with the accused or another person is presumptively inadmissible and only allowed with the prior leave of the court and never to infer that, because of the sexual nature of that conduct, the victim is more likely to have consented to the sexual activity at issue or is less worthy of belief in respect of their assertion that they did not consent to the sexual activity at issue. Such evidence can only be adduced for legitimate purposes, such as to establish that a complainant made an inconsistent statement.

b. Rules of procedure: The rules of procedure should give a judge or magistrate hearing a charge of rape/sexual assault a general authority to order measures to protect the safety and wellbeing of the victim/survivor, including, for example, to close the court to the public or to make orders allowing the victim/survivor to:

- give testimony by video link;
- be shielded from the defendant in court, e.g., by a curtain;
- be accompanied by a friend or carer for support in the witness box;
- choose whether to have their identity concealed; and
- access to a range of additional special procedural measures should be available for every child witness in rape/sexual assault trials.

7. Appropriate penalties

Reflect gravity of the crime: Penalties for rape/sexual assault should reflect the gravity of the crime, and exclude the death penalty and corporal punishment as contrary to international human rights law.

8. Mediation and settlement are not replacements for criminal prosecution

Express prohibition: The law should prohibit the following:

- mandatory mediation, conciliation or reconciliation between the victim/survivor and the alleged perpetrator;
- monetary settlement in place of criminal prosecution; and
- marriage between the perpetrator and the victim/survivor in place of criminal prosecution.

9. Implementation and monitoring are essential

- a. An independent monitoring process:** To ensure the law is effective, there should be an independent, expert monitoring process, such as a multi-agency body with authority to monitor the implementation of the law and make recommendations to government.
- b. Collection of disaggregated data:** The law should require all justice sector actors (courts, prosecutors, police, public defenders and public solicitors, such as legal aid) to collect data, for example on the number of rape/sexual assault complaints, investigations completed, charges laid, convictions, acquittals, and related data. All data should be able to be disaggregated by sex, age, disability (including by disability type), sexual orientation, gender identity, and by other factors relevant to the local circumstances (such as ethnicity or other status).
- c. Publication of data and information for transparency and accountability:** Some information from data collected should be published routinely and made available to the public, including data from the justice sector agencies, as well as anonymised court decisions. Disaggregated data on the prevalence of rape/sexual assault help not only with targeted prevention measures but also with sensitising the public to the nature, impact and extent of the problem. Publishing court decisions helps the public to better understand the decisions of the court, makes the court and judiciary accountable for the decisions that they make, and also serves to assist lawyers with their ongoing professional training.

- 27 Note that this is the approach recommended by UN Women and others: UN Women, above n10.
- 28 Violence against women and girls includes physical, sexual and psychological violence against women and girls in the home, within the general community, at work and at school. It includes rape and all forms of sexual violence, as well as domestic/family violence, and harmful practices such as female genital mutilation, forced marriage and sexual exploitation. *Declaration on the Elimination of Violence against Women*, above n9. Also, Council of Europe, above n25.
- 29 Moon, above n3.
- 30 The majority (30%) of these women experienced violence at the hands of their husband or boyfriend: World Health Organization (2019) *Violence against women* <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>> (last accessed March 2019).
- 31 For example, D Stubbs & S Tawake (2009) *Pacific Sisters with Disabilities: At the intersection of discrimination* (UNDP Pacific Centre, Suva, Fiji, 2009) <<http://wwda.org.au/wp-content/uploads/2013/12/pacificsisters1.pdf>> (last accessed March 2019).
- 32 UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23 <<https://www.refworld.org/docid/3ae6b39ec.html>> (last accessed March 2019); *Ending Violence Against Women and Girls: Evidence, Data and Knowledge in Pacific Island Countries*, (2nd ed, UN Women Pacific, Fiji, 2011) <<http://www2.unwomen.org/-/media/field%20office%20easia/docs/publications/2011/ending%20violence%20against%20women%20and%20girls.pdf?la=en>> (last accessed March 2019).
- 33 UN Women, *Consequences and costs* (2010) <<http://www.endvawnow.org/en/articles/301-consequences-and-costs.html>> (last accessed March 2019).
- 34 World Health Organization, *Strengthening health systems to respond to women subjected to intimate partner violence or sexual violence: a manual for health managers* (WHO, Geneva, 2017) 6–8 <<http://www.who.int/reproductivehealth/publications/violence/vaw-health-systems-manual/en/>> (last accessed March 2019).
- 35 *Sustainable Development Goal 5: Achieve gender equality and empower all women and girls* (2018) UN Sustainable Development Goals: Knowledge Platform, Targets & Indicators Tab, ‘Sustainable Development Goal 5.2: Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation’ <<https://sustainabledevelopment.un.org/sdg5>> (last accessed March 2019).
- 36 For example, UN Women, *A Framework to Underpin Action to Prevent Violence Against Women* (UN Women, New York, 2015) <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/prevention_framework_unwomen_nov2015.pdf?la=en&vs=5223> (last accessed March 2019).
- 37 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> (last accessed March 2019).
- 38 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> (last accessed March 2019).
- 39 Australian Law Reform Commission (ALRC), *Family Violence - A National Legal Response* (ALRC Report 114) (ALRC, Sydney, 2010) [27.280]–[27.282] <<https://www.alrc.gov.au/publications/27.%20Evidence%20in%20Sexual%20Assault%20Proceedings/evidence-recent-and-delayed-complaint>> (last accessed March 2019).
- 40 *R v Henry* (1968) 53 Cr App Rep 150 at 153.
- 41 *People v Brown* (Superior Court of Sacramento County, No. S034554, 17 November 1994) <<https://law.justia.com/cases/california/supreme-court/4th/8/746.html>> (last accessed March 2019).
- 42 For example, *Sexual Offences Act 2006* (Kenya) s 43(5).
- 43 M Hale, *Pleas of the Crown* (1847) 629.

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- 44 Note that the marital rape exception is not confined to common law countries or former British colonies. For example, it exists in Indonesia, Oman and Jordan. *The Global Rape Epidemic*, above n37, 6.
- 45 See, for example, New Zealand, *Pacific Program for Domestic Violence Prevention* (2019) <<http://www.ppdvp.org.nz>> (last accessed March 2019).
- 46 For a discussion of the state of rape/sexual assault laws at the beginning of the reform period in the Pacific, see C Forster, 'Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards' (2009) 33 *Melbourne Law Review* 833 <https://law.unimelb.edu.au/data/assets/pdf_file/0009/1705248/33_3_6.pdf> (last accessed March 2019).
- 47 P Imrana Jalal, *Supplement to Law for Pacific Women* (Pacific Regional Rights Resource Team Secretariat of the Pacific Community, Suva, 2016) 11 <<http://fwrn.org.fj/publications/research-analysis/law-for-pacific-women-1998-supplement-2013>> (last accessed March 2019).
- 48 UN Women, above n10, 5.
- 49 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), Article 1, <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/3731&Lang=en> (last accessed July 2019).
- 50 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 35: Violence against women*, updating general recommendation No. 19, 67th sess, UN Doc CEDAW/C/GC/35. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/35&Lang=en (last accessed July 2019).
- 51 Directorate General for Internal Policies, *Overview of the worldwide best practices for rape prevention and for assisting women victims of rape* (European Parliament, 2013) 17–18, on file with authors.
- 52 *Declaration on the Elimination of Violence Against Women in the ASEAN Region* (2004) <https://asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4> (last accessed March 2019).
- 53 *Pacific Leaders Gender Equality Declaration* (30 August 2012) Pacific Islands Forum Secretariat <<https://www.forumsec.org/pacific-leaders-gender-equality-declaration/>> (last accessed March 2019).
- 54 *A new road map to fast track gender equality* (9 October 2017) Pacific Community <<https://www.spc.int/updates/blog/2017/10/new-road-map-fast-track-gender-equality>> (last accessed March 2019).
- 55 *Pacific Platform for Action on Gender Equality and Women's Rights 2018–2030* (Pacific Community/Communauté du Pacifique, 2017) pt II, 16. <<https://www.spc.int/sites/default/files/wordpresscontent/wp-content/uploads/2017/10/PPA-Gender-Equality-Womens-Human-Rights.pdf>> (last accessed March 2019). The South Pacific Community is mandated to support Governments to implement the Platform, and produces regular progress reports. It has been reported that civil society was closely involved in developing the PPA, and actively uses the PPA to engage with Governments in support of women's rights and gender equality efforts. Charmaine Rodrigues, *Draft Review of law reform and advocacy opportunities in support of PIDSOGIESC+, gender equality and women's rights: Draft* (Unpublished report for the Equality and Justice Alliance, 8 February 2019, on file with the authors).
- 56 Committee on the Elimination of Discrimination Against Women, *Concluding observations on the seventh periodic report of Kenya, Addendum*, 48th sess, UN Doc CEDAW/C/KEN/CO/7/Add.1 (5 April 2011) <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPrICaqhKb7yhsGlff%2fiaZrVw%2bcyfdY9GxZ7i2n0QWvM8vI79Q8DSzWzmzFdhrJ1x%2bNX-1obWCSNHw9BZgQ4sKsmiDcvFyKsBv%2fbpBCMH%2buFpeaWg1KmEEx9oPm>> (last accessed March 2019).
- 57 *Sexual Offences Act 2006* (Kenya) s 43(5).

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- 58 There is also jurisprudence from the regional Inter-American and European Courts of Human Rights and some national courts on violence against women, including rape. For example, the European Court has directed states to enact criminal legislation for all forms of violence against women and girls, to review and reform existing laws and policies, and to monitor the way in which these laws are enforced, cited in UN Women, above n10, 7–8. An effective study of jurisprudence on rape would be vast, and is outside the scope of this report.
- 59 Committee on the Elimination of Discrimination Against Women, above n49, 13. The Committee has also issued *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, 56th sess, UN Doc CEDAW/C/GC/30 (1 November 2013) <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/30&lang=en> (last accessed March 2019).
- 60 Committee on the Elimination of Discrimination Against Women, above n13, and Committee on the Elimination of Discrimination Against Women, above n49.
- 61 Committee on the Elimination of Discrimination Against Women, above n13, [2].
- 62 Ibid [33].
- 63 UN Women, above n10.
- 64 Africa Commission on Human and People's Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa (Naimey Guidelines)* (2017) <<http://www.achpr.org/instruments/combating-sexual-violence/>> (last accessed March 2019).
- 65 The approaches in this model are similar to those adopted by Fiji, Solomon Islands and Vanuatu. *Pacific Island Forum Sexual Offences Model Provisions 2010*, reported in Jalal, above n47, 18.
- 66 Africa Commission on Human and People's Rights, above n64, preamble. The Africa Commission on Human and People's Rights has given a lot of guidance to states in relation to rape in other formats, including general comments, e.g., on the right to reparation for victims of torture and other cruel, inhuman or degrading treatment or punishment, including victims of sexual violence, *General Comment No. 4 of Article 5* (2017), and topical and country-specific resolutions, e.g., *Resolution 111 on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence* (2007) and *Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity* (2014). For a full list: <<http://www.achpr.org>> (last accessed March 2019).
- 67 Christine Forster & Vedna Jivan, *Translating CEDAW into Law: Legislative Compliance in Nine Pacific Countries* (UNIFEM, UNDP, 2006).
- 68 Drawn from the *Penal Code Amendment (Sexual Offences) Act 2016* (Solomon Islands) s 136A.

8. Sexual offences and people with disability

Disability and sexual conduct

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

- 8.1 Sexual offences laws in many countries, including in the Commonwealth, reflect outdated, discriminatory and negative attitudes towards people with disability. We see this in the use of derogatory language to describe people with disability, such as ‘idiot’ or ‘imbecile’. We also see it in the underlying assumptions reflected in the law that people with disability have no autonomy and so cannot consent to sexual conduct or understand the nature of it, or are less than fully human and therefore are not, or should not be, sexual. A common response in sexual offences laws to these assumptions is to criminalise all sexual activity with a person with a disability (sometimes limited to cognitive disability) in an effort to protect them from sexual exploitation and abuse.
- 8.2 Related—and sometimes contradictory—assumptions reflected in sexual offences laws about people with disability are that they are:⁶⁹
- helpless and inherently vulnerable, and therefore are:
 - more likely to be raped; or
 - in the case of women and girls, in need of a prophylactic approach to prevent pregnancy;
 - incapable of consenting, either cognitively or in terms of their primary/sole modes of communication;
 - not sexual or asexual or hypersexual;
 - heterosexual only;
 - not capable of sexual activity;
 - not sexually attractive;
 - not people who should have sexually intimate relationships; and
 - unable to understand that non-consensual sex is wrong.

- 8.3 These assumptions are based on negative and ill-informed stereotypes about people with disability and prevent their equal enjoyment of their human rights. They fail to understand that people with disability are not inherently vulnerable but are made vulnerable by the social and structural systems that constrain and control their lives, and fail to support them to exercise their legal capacity. These assumptions 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 (to exercise their 'legal capacity').
- 8.4 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.⁷⁰ The data also show that the risk is particularly acute for women and girls with disability, and people with disabilities 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.
- 8.5 The traditional focus on protection and vulnerability is reflected in some early international instruments on the rights of persons with disabilities.⁷¹ Over time, this has increasingly been balanced with recognition of the right of people with disability to have their sexual relationships and their decisions about sexual activity respected. For example, in September 1982, the UN Advisory Committee on the International Year of Disabled Persons, in its report proposing the World Programme of Action Concerning Disabled Persons (the **Programme of Action**), identified equalisation of opportunities for full participation as including participation in 'sexual partnership'. The Programme of Action was adopted by the UN General Assembly later in 1982.⁷² Earlier international human rights documents more commonly reflect the element of vulnerability and protection and are silent on sexuality.
- 8.6 Later still, Rule 9 of the 1994 UN *Standard Rules for the Equalization of Opportunities for Persons with Disabilities* (**Disability Standard Rules**) calls, on the one hand, for the protection of the fundamental rights of people with disability 'with respect to sexual relationships, marriage and parenthood', and, on the other hand, says that people with disability and their families should be informed of precautions needed to prevent abuse, as people with disability are particularly vulnerable to such abuse.⁷³
- 8.7 The 2007 UN *Convention on the Rights of Persons with Disabilities* (**CRPD**)⁷⁴ is the basis for the good practice criteria used in this part of the report. The Convention emphasises autonomy throughout its provisions, beginning with a strong statement in the Preamble 'recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices',⁷⁵ and stating, as the first general principle of the CRPD, 'Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.⁷⁶ The Convention is discussed in more detail below.

Common attitudes towards people with disability

- 8.8 In considering what good practice sexual offences laws in relation to people with disability might require, it is necessary to understand that most countries treat people with disability as vulnerable and in need of cure and/or protection. This viewpoint is reflected in laws, policies and practices. The maintenance in many countries of institutional settings housing people with disability, the enduring poverty faced by people with disability in both Global North and Global South countries, and laws that actively discriminate against people with mental illness are just three examples that indicate we, as a global community, are still a long way from full recognition of the human rights of people with disability, and that archaic attitudes continue to shape government and community responses to disability.
- 8.9 It is only in relatively recent times that some countries have moved closer to an acceptance of people with disability as people with all the same rights and freedoms as others, and whose capacity to exercise those rights and freedoms is respected. The biggest shift in attitudes at a global level began, arguably, in the 1970s and 1980s with the development of the 'social model of disability' and the International Year of Disabled People (IYDP) in 1981.⁷⁷

FIGURE 5: Models of disability: The medical model and the social model

Models of disability: The medical model and the social model

It is common for people with disability—irrespective of the type of impairment—to be seen as having a physiological deficit that requires either fixing through medical or similar intervention, being overcome by the individual heroic actions of the person themselves, or separating from mainstream society by living within a special and separate setting where help can be made available to do some of the things other people do in their lives. This sees people as embodying their physiological impairment, as being in and of themselves a problem to be dealt with, and in need of cure or care. This attitude is referred to among disability activists as the 'medical model' of disability.

In contrast, since the 1970s, disability rights activists have developed the 'social model' of disability. This model recognises the existence of bodily impairments, and externalises the disabling impacts: identifying society and its structures and processes as creating the barriers to full equality experienced by people with impairments:

In our view, it is society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society.⁷⁸

The social model of disability seeks to shift the focus from this individual personal deficit model to a model that recognises the way 'physical structures, societal systems, culture and social environments impose limitations on certain groups or categories of people',⁷⁹ including people with disability. Its central focus is on the need for societies

and societal structures and processes to change (to be 'fixed'), rather than people with disability.⁸⁰ This approach is mirrored in the UN Human Rights Committee's understanding of equality and non-discrimination as including substantive equality, which requires understanding of how systems and practices restrict equality of opportunity and need to be challenged if full equality is to be realised.⁸¹

The Committee expressly rejected the view that 'enjoyment of rights and freedoms on an equal footing [...] mean[s] identical treatment in every instance',⁸² noting instead the need 'to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination'.⁸³

It is just such conditions that are identified in the social model of disability as creating or exacerbating the day-to-day effects of having a bodily impairment. These conditions include physical structures, laws and programmes that fail (often without meaning to) to consider the circumstances of people with disability, and attitudes that perpetuate the myths of incapacity, danger or weakness.

The law and people with disability

- 8.10 The problematising of people with disability and their bodies is reflected in the approach and framing of laws and legal systems, including sexual offences laws across the Commonwealth.
- 8.11 In the past, laws relating to people with disability have mostly focused on care and protection, segregation and institutionalisation,⁸⁴ control of reproduction,⁸⁵ and welfare support. While many of these laws seem to target people with cognitive impairments or mental illness, laws relating to limiting fertility have also been applied to people with, for example, epilepsy.
- 8.12 It is also important to understand that the distinctions that many of us now readily make between cognitive impairments and other disabilities, such as blindness, deafness and cerebral palsy, were not so readily made or even considered in the past. Historically, no clear distinction was made in relation to these characteristics, and all people with disability were subject to laws controlling their lives and choices. This is reflected in sexual offences laws operating in countries, including in the Commonwealth, that treat all people with disability in the same way, without taking account of individual capacity. An example of this is found in the *Penal Code Act 2010* of Lesotho:

52. Unlawful sexual act

- (1) A person who has unlawful sexual act with another person, or causes another person to commit an unlawful sexual act, commits an offence.
- (2) A sexual act is unlawful if committed under the following circumstances –
[...]
 - (f) the complainant is affected by –
 - (i) physical disability, mental incapacity, sensory disability, medical disability, intellectual disability, or other disability, whether permanent or temporary...

- 8.13 Many of these laws still use what we now consider derogatory and degrading terms to refer to people with disability, such as 'idiots', 'imbeciles', 'feeble minded', 'mentally subnormal' and 'moral defectives'.⁸⁶

FIGURE 6: Derogatory language used to describe people with disability in Commonwealth sexual offences laws

Kiribati Penal Code 1977

135. Defilement of a girl between 13 and 15 years of age, or of idiot or imbecile

(1) Any person who –

[...]

- (b) has or attempts to have unlawful sexual intercourse with any female idiot or imbecile woman or girl under circumstances which do not amount to rape but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile,

shall be guilty of a misdemeanour, and shall be liable to imprisonment for 5 years.

Barbados Criminal Code 2002, Chapter 154

Sexual intercourse with mentally subnormal person:

8. (1) Where a person under circumstances that do not amount to rape has sexual intercourse with another who is an idiot, imbecile or mentally subnormal and who is not the person's spouse, that person is guilty of an offence and is liable on conviction on indictment to imprisonment for a term of 10 years.

Tonga Laws of Tonga 1988, Chapter 18 – Criminal Offences:

118. Rape

(1) Any person committing rape that is to say any person who carnally knows any female –

[...]

- (c) being aware that she is feeble minded, insane or is an idiot or imbecile as to be incapable of giving or refusing consent; or [...]

shall be liable to imprisonment for any term not exceeding 15 years.

- 8.14 More recently, we have seen the development across the globe of laws that recognise the prevalence of discrimination against people with disability and the need to prevent and challenge such discrimination.⁸⁷ Despite this development, many countries, including Commonwealth countries, retain discriminatory criminal laws on unlawful sexual conduct that are inconsistent with the rights of people with disabilities.
- 8.15 These laws continue to give priority to the protection of people with disability from sexual assault by, for example, limiting their right to participate fully in all aspects of life, including engaging in consensual sexual activity. One continuing approach is to place women and girls who may be considered more susceptible to sexual abuse or exploitation on birth control medication, or to sterilise them.⁸⁸

Current approaches within the Commonwealth

- 8.16 Across the Commonwealth there is a range of approaches to sexual offences laws where the victim is a person with disability. However, many Commonwealth countries criminalise sex with people with disabilities (most particularly cognitive disabilities). In doing this, Commonwealth countries maintain a paternalistic attitude to people with disability that is inconsistent with commitments under the CRPD.⁸⁹
- 8.17 These various laws seek to ‘protect’ people with disability, assuming they are inherently vulnerable.⁹⁰ Such protection—whether effective or not—is prioritised over recognition of their legal capacity and right to equality and non-discrimination.
- 8.18 The relevant laws across the Commonwealth disproportionately criminalise sex for women and girls with disability. In her report to the United Nations, *Sexual and reproductive health and rights of girls and young women with disabilities*, UN Special Rapporteur on Disability, Catalina Devandas-Aguilar, observed that women and girls:
- face significant challenges in making autonomous decisions with regard to their reproductive and sexual health, and are regularly exposed to violence, abuse and harmful practices, including forced sterilization, forced abortion and forced contraception.⁹¹
- 8.19 Even with laws in place that expressly criminalise sexual conduct with people with disability, countries do not help victims/survivors to access justice or services when that protection fails.

Girls and young women with disabilities also encounter significant challenges when attempting to access justice, prevention mechanisms and response services for sexual and gender-based violence. Sexual assault is often underreported, and even more so when the individual has a disability. Girls and young women with disabilities face numerous challenges when reporting abuses, such as the risk of being removed from their homes and institutionalized; stigmatization; fears with regard to single parenthood or losing child custody; the absence or inaccessibility of violence prevention programmes and facilities; the fear of the loss of assistive devices and other supports; and the fear of retaliation and further violence by those on whom they are both emotionally and financially dependent [...] In addition, when, as survivors of sexual violence, they report the abuse or seek assistance or protection from judicial or law enforcement officials, teachers, health professionals, social workers or others, their testimony, especially that of girls and women with intellectual disabilities, is generally not considered credible, and they are therefore disregarded as competent witnesses, resulting in perpetrators avoiding prosecution.⁹²

- 8.20 As such, the ‘protection’ found in discriminatory or targeted criminal offence provisions, even if it were appropriate, is ineffective.
- 8.21 For the purposes of this report, we have categorised existing approaches to sexual offences and people with disability in Commonwealth countries into four groups and assessed them to identify any that are fully compliant with obligations under the CRPD. The categories are:
- **Any and all sexual activity with a person with a disability is unlawful:** This approach excludes the possibility of a person with disability engaging in sexual activity even where the person has consented. Examples of such laws are those listed above from Kiribati, Barbados and Lesotho. Ghana’s *Criminal Code 1960* is an example of such criminalisation where the legislation expressly negates any consent that has been given:

FIGURE 7: Criminalising of consensual sexual activity with people with disability

Ghana Criminal Code 1960

102. Carnal Knowledge: **Whoever has carnal knowledge [...] of any idiot, imbecile or a mental patient** in or under the care of a mental hospital whether **with or without his or her consent**, [...] is liable on summary conviction to imprisonment for a term of not less than five or more than twenty-five years.

- **Consent laws that have disability-specific provisions:** This approach categorises people with cognitive impairments in particular as being in a class of people whose consent is suspect. This is to be contrasted with laws that deal with incapacity to consent in terms unlinked to disability. For example, in South Australia a person is assumed not to be able to consent to sexual activity if:

the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing.⁹³
- **Disability-specific sentencing provisions:** This approach treats all people with disability as being of heightened vulnerability, and therefore imposes higher sentencing. For example, in Nauru, it is an aggravating circumstance for sentencing purposes that the accused committed a sexual offence against a person with a serious physical disability or a mental impairment.

FIGURE 8: Example of disability-specific sentencing provision

Nauru Crimes Act 2016

105. Rape

(1) A person (the 'defendant') commits an offence if:

- (a) the defendant intentionally engages in sexual intercourse with another person; and
- (b) the other person does not consent to the sexual intercourse and the defendant:
 - (i) knows that fact; or
 - (ii) is recklessly indifferent to consent of the other person.

Penalty:

- (i) if aggravating circumstances apply—25 years imprisonment; or
- (ii) in any other case—20 years imprisonment.

102. Aggravating circumstances for sexual offences

(1) If an offence under this Part provides for a penalty if aggravating circumstances apply, then that penalty may be imposed if the conduct constituting the offence occurs in any of the following circumstances:

[...]

- (g) either of the following facts applies and the defendant is reckless about that fact:
 - (i) the person in relation to whom the offence is committed has a serious physical disability;
 - (ii) the person in relation to whom the offence is committed has a mental impairment.

- **Disability-neutral laws:** The same laws on sexual offences apply to everyone without distinction, including in relation to consent and the elements of crime. This is the approach taken in Seychelles, for example, examined in Part B of this report.

Sources for the criteria for good practice: Sexual offences laws and people with disability

- 8.22 In developing the list of criteria for good practice sexual offences laws in relation to people with disability, this research has particularly focused on the rights in the ICCPR and the ICESCR, their interpretation by their treaty bodies, and the more recent application of those general human rights to people with disability under the CRPD. Also relevant are the reports of the UN Special Rapporteur on the Rights of Persons with Disabilities, currently Catalina Devandas-Aguilar.⁹⁴
- 8.23 The CRPD is central to an understanding of the rights of persons with disabilities in respect to their sexual autonomy and freedom from sexual violence. Of relevance are:⁹⁵
- **Article 12:** Equal recognition before the law, which includes the right of all people with disabilities to be recognised as ‘persons before the law’, to have their legal capacity recognised equally with all other people in all areas of life, and to be supported to exercise their legal capacity;
 - **Article 16:** Freedom from exploitation, violence and abuse; and
 - **Article 23:** Respect for home and the family, which includes preventing discrimination in relation to ‘marriage, family, parenthood and relationships’, ensuring the right of people with disability to make free decisions about marriage and having children, and to ‘retain their fertility on an equal basis to others’.

Article 12 – Equal recognition before the law

- 8.24 Article 12 is interpreted by the Committee on the Rights of Persons with Disabilities (the **CRPD Committee**) in its General Comment No. 1 as affirming that denial of people with disabilities of their legal capacity has ‘led to their being deprived of many fundamental rights, including [...] the right to give consent for intimate relationships and medical treatment’.⁹⁶
- 8.25 In considering how to balance the right to autonomy with protection from abuse, the Committee stated:⁹⁷
20. Article 12 [...] requires States parties to create appropriate and effective safeguards for the exercise of legal capacity [...] to ensure the respect of the person’s rights, will and preferences. In order to accomplish this, the safeguards must provide **protection from abuse on an equal basis with others.**
- [...]

22. All people risk being subject to ‘undue influence’, yet this may be exacerbated for those who rely on the support of others to make decisions [...] Safeguards for the exercise of legal capacity must include protection against undue influence; **however, the protection must respect the rights, will and preferences of the person, including the right to take risks and make mistakes.**

- 8.26 These observations make it clear that protections must be non-discriminatory and respect the capacity of people with disability to consent to sexual conduct. This approach is reflected in the good practice criteria detailed below.

Article 16 – Freedom from exploitation, violence and abuse

- 8.27 This article has not been the subject of a focused General Comment from the CRPD Committee. It is, however, considered in General Comment No. 1,⁹⁸ and in General Comment No. 3 (see below).⁹⁹

Article 23 – Respect for home and the family

- 8.28 As with Article 16, Article 23 is not the subject of a focused General Comment from the CRPD Committee. It is, however, also considered in General Comment No. 1,¹⁰⁰ and in General Comment No. 3 (see below).¹⁰¹

- 8.29 In its General Comment No. 3, the CRPD Committee considered the specific circumstances of women and girls with disability. It observed:¹⁰²

10. The Committee notes that the contributions [...] highlighted a range of topics and identified three main subjects of concern with respect to the protection of their human rights: **violence, sexual and reproductive health and rights, and discrimination.** Furthermore, in its concluding observations on women with disabilities, the Committee has expressed concern about [...] **the persistence of violence against women and girls with disabilities, including sexual violence and abuse; forced sterilization; [...] sexual and economic exploitation [...]**

- 8.30 Articles 12, 16 and 23 are said by disability rights legal experts to found the right to sexual autonomy for people with disabilities.¹⁰³ This reasoning builds on that of the Committee on Economic, Social and Cultural Rights in its consideration of Article 12 of the ICESCR,¹⁰⁴ in its General Comment No. 22.¹⁰⁵

- 8.31 Within the Commonwealth, 47 countries are states parties to the CRPD, four have signed but not yet ratified, and two have taken no action. This level of adoption of all obligations represents 87% of the membership of the Commonwealth. Of these, 20 countries have so far presented their required periodic State Report to the Committee for review—the latest, Kiribati, in early 2019.

- 8.32 The Committee’s concluding observations have no specific references to discriminatory sexual offences laws, but there are references more broadly to laws that ‘deprive persons with disability of their legal capacity, in particular persons with intellectual and/or psychosocial disabilities’.¹⁰⁶

Criteria for a good practice sexual offence law in relation to people with disability

- 8.33 The following criteria for good practice law in relation to people with disability and sexual conduct are drawn from the CRPD. This includes the articles considered above, namely:
- Article 12 – Equal recognition before the law;
 - Article 16 – Freedom from exploitation, violence and abuse; and
 - Article 23 – Respect for home and the family.

Along with the following articles:

- Article 1 – Purpose;
 - Article 5 – Equality and non-discrimination;
 - Article 6 – Women with disabilities;
 - Article 7 – Children with disabilities; and
 - Article 13 – Access to justice.
- 8.34 The criteria identified are in addition to those set out earlier in this report in relation to rape/sexual assault laws.
- 8.35 The first of the criteria—**equality and non-discrimination**—draws directly on Article 5, and requires that sexual offences laws not treat people with disabilities differently from people without disabilities, including by imposing additional protective measures irrespective of the person’s circumstances.
- 8.36 The second criterion—**dignity and respect**—draws on the principles underpinning human rights law and included in the Preamble and Article 1 of the CRPD:¹⁰⁷

Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.

- 8.37 The third criterion—**the principle of consent**—focuses on the problem of criminalising all sexual conduct involving people with disabilities, treating the person with disability as a perpetual victim, even where the person has the capacity to give, and has given, free and voluntary consent. It draws on Articles 5, 12 and 23 of the CRPD, and the interpretation of those articles and others by the CRPD Committee in its General Comments.
- 8.38 The fourth criterion—**available defences to rape/sexual assault**—deals with the need to ensure that defences to charges of rape/sexual assault against a person with a disability take account of the potential vulnerabilities of some people with disability who may be under the care and/or control of the perpetrator, or whose cultural context is argued to provide an excuse for non-consensual sexual activity with a person with disability.

- 8.39 The fifth criterion—**rules of evidence and procedure**—draws on Articles 12 and 13, and takes account of the concerns identified by the UN Special Rapporteur about the common failure to prosecute sexual crimes against people with disability. It also considers the increasing use, in some Commonwealth countries, of intermediaries to support effective communication for people with disability in the justice system, as well as other modifications to criminal trial procedures (and pre-trial procedures) to increase access to justice for people with disability.¹⁰⁸
- 8.40 The sixth criterion—**appropriate penalties**—considers the use of sentencing provisions to deal with sexual assault that is exploitative of people with disability, or which takes advantage of vulnerabilities created by the circumstances in which people with disability often find themselves. We propose that good practice requires general sentencing provisions that include a list of circumstances in which the exploitation of a particular circumstance of the particular victim/survivor that creates a vulnerability should be considered as aggravating factors in sentencing when appropriate, depending on the facts of the case. It should not be the case that all sentencing in respect of sexual assaults involving a victim/survivor with disability would enliven such provisions. It equally should not be the case that sentencing in respect of sexual assault involving any other victim/survivor whose circumstances create some vulnerability—whether permanent, circumstantial or time-specific—would not enliven such provisions.
- 8.41 The European Union Agency for Fundamental Rights¹⁰⁹ takes the view that increased penalties for offences where the victim/survivor has a disability are consistent with Article 16 of the CRPD.¹¹⁰ We do not support this as a blanket rule, but rather consider that good practice enables a sentencing judge to consider whether there are relevant aggravating circumstances, or circumstances that make the victim/survivor more vulnerable.

FIGURE 9: Criteria for good practice: Sexual offences and people with disability

1. Equality and non-discrimination

- a. **General criteria apply:** All of the criteria identified in this report for good practice laws in relation to rape/sexual assault also apply here. The following principles are additional principles or applications of those criteria to the situation of people with disability.
- b. **Disability-neutral:** Sexual offences provisions should be disability-neutral; any person, regardless of whether or not they have a disability, may become the victim of rape or sexual assault. The definition should not exclude or target any potential victim/survivor.
- c. **No special offences:** There should be no criminalising of conduct on the basis that one or more of the participants in sexual conduct is a person with disability.

2. Dignity and respect

Respectful language: The definition of the crime and defences available, and laws dealing with sentencing, should not use language that devalues or is derogatory to people with disability.

3. Rape and sexual assault is non-consensual

- a. **No criminalising of consensual sexual conduct:** Absence of consent must be an element of rape/sexual assault. No consensual sexual activity between adults in private should be criminalised.
- b. **Submission is not consent:** The law should make clear that passivity or submission by the victim/survivor does not equal consent. This is important in relation to people with disability because of the potential risks for people who have limited or no verbal communication, who have limited physical capacity to resist, who are heavily medicated, or who are under the care and/or control of the perpetrator.
- c. **Physical resistance not necessary:** The law should expressly state that lack of evidence of physical resistance or lack of evidence of physical injury to the victim/survivor is not, by reason only of that fact, to be regarded as indicating consent to the act. This is important for the same reasons as 3(b) above.
- d. **Reasonable steps to ascertain consent:** The law should provide that an accused must have taken reasonable steps to determine if the other person consented to the sexual conduct. It should give examples of what 'reasonable steps' might include as guidance for the fact finder in a trial. This is particularly relevant to situations involving people who rely on non-verbal forms of communication.
- e. **Circumstances in which consent cannot be given:** The law should give an inclusive list of circumstances in which consent cannot be given. In addition to the circumstances listed in the general criteria relating to rape/sexual assault, these should include circumstances where:
 - there is no effective means of communication between the person and the perpetrator;
 - the person submits because they are detained or institutionalised;
 - the person submits because the perpetrator has control over them in either a physical, emotional, financial or legal sense;
 - the person submits because they are in some way constrained, including through use of chemical restraints, physical restraints, or due to limited mobility;
 - the person submits because they are unable to escape, including due to removal by the perpetrator of any device needed by the person for mobility or navigation; and
 - the person is asleep or unconscious, due to coma, for example.

4. Available defences

No defence relating to capacity or ignorance: The law should not allow defences to rape or sexual assault of education or charity, e.g., ‘teaching’ the person about sexual conduct.

5. Rules of evidence and procedure

- a. **Rules of evidence** in criminal proceedings for sexual offences involving people with disability should make clear that:
 - courts must make special arrangements to ensure that the evidence of a person with disability can be given in the form in which they communicate;
 - there must be no negative connotations for the credibility of a witness’s testimony where it is given in the form in which they communicate;
 - judicial decision makers must provide guidance to jurors (where a jury is empanelled) about giving equal and non-discriminatory consideration to the testimony of witnesses affected by disability.
- b. **Rules of procedure:** The rules of procedure should give a judge or magistrate hearing a charge of rape or other sexual offence a general power to order measures to protect the safety and wellbeing of the survivor, including, for example, to close the court to the public, or to make orders allowing the survivor to:
 - be questioned in a manner that is appropriate to their capacity and circumstance; and
 - have access to a trained intermediary throughout the criminal justice process, including in court.

6. Appropriate penalties

Reflect targeted or exploitative circumstances: Penalties should reflect any findings that the victim was specifically targeted because of:

- their personal attributes, including disability;
- the imbalance of power between the victim and the perpetrator; and
- the circumstantial vulnerability of the victim, and factors that might interfere with their capacity to defend themselves or report the offence.

- 69 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://tbineternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD/C/GC/3&Lang=en>
- 70 See, for example, Stubbs & Tawake, above n31.
- 71 See, for example, *Declaration of the Rights of Disabled Persons*, GA Res 3447 (XXX), UN GAOR, 30th sess, 2433rd plen mtg, Agenda Item 12, UN Doc A/RES/3447 (XXX) (9 December 1975) art 10 <[https://undocs.org/en/A/RES/3447\(XXX\)](https://undocs.org/en/A/RES/3447(XXX))>; *Declaration of the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI), UN GAOR, 26th sess, 2027th plen mtg, Agenda Item 12, UN Doc A/RES/2856 (XXVI) (20 December 1971) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0328/72/IMG/NR032872.pdf?OpenElement>>.
- 72 *World Programme of Action concerning Disabled Persons: Report of the Secretary-General*, UN GAOR, 37th sess, Agenda Item 89, UN Doc A/37/351/Add.1 + Corr J (15 September 1982) Annex [21] on 23, and [72]–[74] on 35 <http://www.un.org/ga/search/view_doc.asp?symbol=a/37/351/add.1>. See also, *World Programme of Action Concerning Disabled Persons*, GA Res 37/52, UN GAOR, 37th sess, 90th plen mtg, Agenda Item 89, UN Doc A/RES/37/52 (3 December 1982) <<http://www.un.org/documents/ga/res/37/a37r052.htm>> for the official text of the resolution, and <<https://www.un.org/development/desa/disabilities/resources/world-programme-of-action-concerning-disabled-persons.html>> for the text along with information and links.
- 73 *Standards Rules for the Equalization of Opportunities for Persons with Disabilities*, GA Res 48/96, UN GAOR, 48th sess, 85th plen mtg, Agenda Item 109, UN Doc A/RES/48/96 (4 March 1994) <<http://www.un.org/documents/ga/res/48/a48r096.htm>> (emphasis added).
- 74 *Convention on the Rights of Persons with Disabilities (CRPD)*, opened for signature 30 March 2007, 2515 UNTS 3, (entered into force 3 May 2008) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-15&chapter=4&lang=en&clang=en>.
- 75 Ibid Preamble.
- 76 Ibid art 3(a).
- 77 The model, with principles first set out by the UK Union of the Physically Impaired Against Segregation, was considered in an academic context by Vic Finkelstein, *Attitudes and disabled people* (World Rehabilitation Fund, New York, 1980), and To deny or not to deny disability, in Ann Brechin, Penny Liddiard and John Swain (eds), *Handicap in a Social World: A Reader* (Hodder and Stoughton, Sevenoaks, 1981); Colin Barnes, *Disabled people in Britain and discrimination* (Hurst and Co, London, 1991); and Michael Oliver, *The Politics of Disablement* (Macmillan, London, 1990) and *Understanding disability: from theory to practice*, (Macmillan, Basingstoke, 1996).
- 78 Union of the Physically Impaired Against Segregation, *Fundamental Principles of Disability*, cited in Michael Oliver, *Understanding disability: from theory to practice*, (Macmillan, Basingstoke, 1996) 22.
- 79 Michael Oliver, Bob Sapey and Pam Thomas, *Social Work with Disabled People* (4th edn, Pgrave Macmillan, London, 2012) 15.
- 80 More recently, Tom Shakespeare and others have critiqued the social model. Shakespeare, in *Disability Rights and Wrongs Revisited* (Routledge, 2013) 2, notes other ‘progressive’ accounts of disability, including ‘the North American minority group approach, the social constructionist approach, the Nordic relational model.’ This critique considers the rigidity of the social model and the ‘dangerous tendency to equate the social model with purity and orthodoxy’ (Tom Shakespeare and Nicholas Watson, ‘The social model of disability: an outdated ideology?’ [2002] 2 *Research in Social Science and Disability* 9–28, 14). See also, Liz Crow, ‘Including all our lives’, in Jenny Morris (ed), *Encounters with strangers: feminism and disability* (Women’s Press, London, 1996); Sally French, ‘Disability, impairment or something in between’, in John Swain, Vic Finkelstein, Sally French and Mike Oliver (eds), *Disability Barriers, Enabling Environments* (Sage, London, 1993) 17–25; Carol Thomas, *Female forms: experiencing and understanding disability* (Open University Press, Buckingham, 1999).

- 81 See, for example, Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol 1) (10 November 1989) [8], dealing with the right to non-discrimination in the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, GA Res 2200A (XXI), 999 UNTS 171, UN Doc A/6316 (1966) (entered into force 23 March 1976). <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND>.
- 82 Ibid [8].
- 83 Ibid [10].
- 84 See, for example, the *Mental Deficiency Act 1913* (UK), repealed by the *Mental Health Act 1959* (UK).
- 85 See, for example, in Alberta, Canada, the *Sexual Sterilization Act*, RSA 1928, repealed in 1972, and in British Columbia, Canada, the *Sexual Sterilization Act*, RSBC 1933, repealed in 1973. Similar laws or policies were enacted in non-Commonwealth countries in the first half of the 20th Century, including Germany, Sweden, Japan.
- 86 ‘Moral defectives’ was used in the now repealed *Mental Deficiency Act 1913* (UK). Also, ‘the danger of procreation with its attendant risk of multiplication of the evil by transmission of the disability to progeny’ was found in the repealed *Sexual Sterilization Act 1928* (Alberta, Canada).
- 87 See, for example, within the Commonwealth: in Canada, the *Canadian Charter of Rights and Freedoms*, RSC 1982, and the *Canadian Human Rights Act*, RSC 1985; in Australia, the *Disability Discrimination Act 1992*; in Zimbabwe, the *Disabled Persons Act 1992*; in New Zealand, the *Human Rights Act 1993*; and, in the UK, the *Disability Discrimination Act 1995*.
- 88 See, for example, Committee on the Rights of Persons with Disabilities: Initial report submitted by Jamaica under article 35 of the CRPD, due in 2010, UN Doc CRPD/C/JAM/1 (27 November 2018) [112]; Committee on the Rights of Persons with Disabilities: *Implementation of the Convention on the Rights of Persons with Disabilities – Initial reports submitted by States parties under article 35 of the Convention: New Zealand*, UN Doc CRPD/C/NZL/1 (1 October 2013) [122].
- 89 *Convention on the Rights of Persons with Disabilities (CRPD)*, above n20.
- 90 Anna Arstein-Kerslake & Eilíonóir Flynn, ‘Legislating Consent: Creating an Empowering Definition of Consent to Sex That is Inclusive of People with Cognitive Disabilities’ (2015) 25(2) *Social and Legal Studies* 225–48, 226 <<https://journals.sagepub.com/doi/abs/10.1177/0964663915599051>> (last accessed March 2019).
- 91 Catalina Devandas-Aguilar, UN Special Rapporteur on the Rights of Persons with Disabilities, *Sexual and reproductive health and rights of girls and young women with disabilities*, 72nd sess, UN Doc A/72/133 (14 July 2017) 3 [3] <<https://undocs.org/A/72/133>>. See also, Committee on the Rights of Persons with Disabilities, above n88, [51].
- 92 Ibid, Devandas-Aguilar, [36]. See also, Committee on the Rights of Persons with Disabilities, above n88 [52].
- 93 *Criminal Law Consolidated Act 1935* (South Australia) s 46(3)(e),
- 94 Ms Devandas-Aguilar was appointed the first Special Rapporteur on the Rights of Persons with Disabilities on 1 December 2014. Information about this position and its mandate can be found on the website of the United Nations Office of the High Commissioner for Human Rights <<https://www.ohchr.org/en/issues/disability/srdisabilities/pages/srdisabilitiesindex.aspx>>.
- 95 There are no relevant decisions of the Committee on individual communications under the Optional Protocol to CRPD alleging breaches of the CRPD.
- 96 Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [8] (emphasis added) <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en>.
- 97 Ibid [20] & [22] (emphasis added).
- 98 Ibid [42].

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- 99 Committee on the Rights of Persons with Disabilities, *General Comment No. 3 on women and girls with disabilities*, 16th sess, UN Doc CRPD/C/GC/3 (25 November 2016) [29] <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en>.
- 100 Committee on the Rights of Persons with Disabilities, above n96, [8] & [29(f)].
- 101 Committee on the Rights of Persons with Disabilities, above n99, [38]–[46].
- 102 Ibid [10].
- 103 See, for example, Arstein-Kerslake & Flynn, above n90, 228.
- 104 *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), 993 UNTS 3, UN Doc A/6316 (1966) (entered into force 3 January 1976) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en>.
- 105 Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/22 (2 May 2016) [11]–[12] <<https://www.escr-net.org/resources/general-comment-no-22-2016-right-sexual-and-reproductive-health>>.
- 106 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Kenya*, UN Doc CRPD/C/KEN/CO/1 (30 September 2015) [23] <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fKEN%2fCO%2f1&Lang=en>.
- 107 CRPD, above n20, preamble paragraph 1. See also art 1.
- 108 See, for example, *Tasmanian Law Reform Institute (TLRI), Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* (TLRI, Hobart, 2018); Judicial College (UK), *Equal Treatment Bench Book* (2018) <<https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/>> (last accessed March 2019); Law Council of Australia, *The Justice Report: Final Report – Part 1 People with Disability* (2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>> (last accessed March 2019).
- 109 European Union Agency for Fundamental Rights, *Equal Protection For All Victims Of Hate Crime: The Case Of People With Disabilities* (2015) <<http://fra.europa.eu/en/publication/2015/equal-protection-all-victims-hate-crime-case-people-disabilities>>.
- 110 Ibid 3.

9. Consensual same-sex sexual activity

The challenges faced by Lesbian, Gay, Bisexual and [Transgender] (LGBT) citizens across the Commonwealth have been well documented. Attention has often focused on the worst cases of discrimination and persecution against LGBT citizens and condemnation from Western political leaders. While a spotlight on persecution is warranted an exclusive focus on worst cases has obscured significant and accelerating progress being made on the rights of LGBT people around the Commonwealth.¹¹¹

TERMINOLOGY

Same-sex sexual activity in this report means consensual sexual activity in private between people who are of the same sex or gender. They may or may not identify, or be identified, as LGBT+. Other terms used elsewhere to describe same-sex sexual activity, include same-sex conduct, same-sex relations, same-sex relationships, and same-sex intimacy.

Partial decriminalisation refers to the unequal or qualified reform of laws criminalising same-sex sexual activity. Continued inequalities include a higher age of consent for same-sex sexual activity and the disproportionate application of public morality laws to LGBT+ people. Partial decriminalisation can occur through legislation, a court ruling, or both.

Complete or full decriminalisation refers to the repeal of laws criminalising same-sex sexual activity so that no unequal or discriminatory provisions remain. This can also occur through legislation, a court ruling, or both.

- 9.1 Two thirds (34 of 53) of Commonwealth member states, plus the New Zealand associate jurisdiction of the Cook Islands, still criminalise same-sex sexual activity, and half of all nations which still criminalise this activity are in the Commonwealth. While these figures are stark and highlight the need for more action on legislative reform across the Commonwealth, real progress is being made in Commonwealth Global South nations, some of which are setting a higher standard than exists in many Global North nations.
- 9.2 For example, the decriminalisation of male same-sex sexual activity in Commonwealth Global South nations is accelerating. Ten Global South jurisdictions have decriminalised in the past 12 years compared to two in the preceding 40 years, beginning with decriminalisation in England and Wales in 1967.¹¹² Of the 10, six have decriminalised in the past four years.¹¹³

The acceleration of the trend towards decriminalisation in the Commonwealth reflects a global trend, but it is more pronounced within the Commonwealth. This may be because links between Commonwealth countries have helped promote the movement for reform (See *Timeline of decriminalisation in the Commonwealth*, Annexure 2).

FIGURE 10: Decriminalisation of male same-sex sexual activity in Commonwealth global south nations



Ten Global South jurisdictions have decriminalised in the past 12 years compared to two in the preceding 40 years, beginning with decriminalisation in England and Wales in 1967.

- 9.3 Another way in which Commonwealth Global South nations are leading the way is that they are choosing to fully decriminalise. They have not followed the example of many of the earlier Global North Commonwealth countries to decriminalise, which left in place, or created, new discriminatory laws, such as different ages of consent. Only full decriminalisation, in which all discriminatory and persecutory laws are repealed or reformed, is consistent with human rights. Therefore, for the purposes of this report, only countries that have fully decriminalised are assessed as having ‘good practice’ laws.
- 9.4 Commonwealth Global South nations are not only setting high standards when it comes to legislative reform, they are also setting high standards in judicial decisions. For example, recent court decisions striking down laws criminalising same-sex sexual activity in India and Belize have recognised the equality and non-discrimination rights of LGBT+ people, as well as their right to privacy. This compares favourably to earlier court decisions about Global North jurisdictions, for example in Northern Ireland and Cyprus, where laws criminalising same-sex sexual activity were condemned as a breach of privacy alone. No less importantly, recent court decisions have also explicitly upheld the dignity and equal humanity of LGBT+ people in a way that earlier decisions regarding laws in Global North countries did not. One of the reasons for this welcome evolution is that recent court decisions in Global South countries have built on and been able to further develop the precedents set elsewhere. Another reason is the contribution of LGBT+ and allied communities to decisions about how litigation is run and the scope of evidence provided. India and Belize provide excellent examples of this. (See country case studies in Part B.)

Background

- 9.5 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. However, as has been extensively documented, among the nations of the Commonwealth and many other countries in the world, these people have long been criminalised. In the Commonwealth, the numbers are well known: 36 jurisdictions still criminalise sexual activity between people of the same sex.
- 9.6 While there is a clear overall trend towards the decriminalisation of male same-sex sexual activity in the Commonwealth Global South nations, there was a counter trend in the last part of the 20th century towards the specific criminalisation of female same-sex sexual activity. Between 1986 and 2011, nine Global South countries in the Commonwealth that previously only criminalised male same-sex sexual activity extended their laws to include female same-sex sexual activity.¹¹⁴ Ironically, this has sometimes occurred as part of a broader move to make sexual offences gender-neutral, as was the case in Botswana (1998) and the Solomon Islands (1990).¹¹⁵
- 9.7 This trend seems to be abating as the decriminalisation of male same-sex sexual activity is accelerating. As of August 2019, female same-sex sexual activity is criminalised in 16 Commonwealth countries. The last Commonwealth country to enact new laws criminalising female same-sex sexual activity was Malawi in 2011.¹¹⁶

The Imperial tide

- 9.8 It is well documented that laws criminalising consensual same-sex sexual activity were enacted across the British Empire during the colonial era. In Britain, between the beginning of the 16th and the end of the 20th century, some or all sexual activity between men was punishable under criminal law. Anal intercourse between any two people, termed ‘buggery’ in the law, was also illegal for most of that period. From 1885, all other sexual activity between men was outlawed under the term ‘acts of indecency’. These criminal offences included all sexual contact between consenting adult men in private. There were also public morality laws, including laws about soliciting and vagrancy, that were disproportionately applied to men who had sex with other men.
- 9.9 Less well known are laws criminalising sex between women in some Commonwealth countries. These laws are an extension of colonial-era laws against male same-sex sexual activity. In the UK, sex between women was not explicitly outlawed, but still fell afoul of British authority, especially in its penal colonies where same-sex relationships between women were systematically punished. As of 2019, 16 Commonwealth jurisdictions criminalise consensual sexual activity between women, in some cases expressly.¹¹⁷ Notably, though, even in those countries where sex between consenting women in private is not criminalised (or not explicitly criminalised), lesbians and bisexual women are often arrested or threatened with arrest, and face many of the same harms as gay men.¹¹⁸

- 9.10 The period in which the buggery laws were enacted coincided with Britain's expansion as an imperial power, first in the Americas and India, and later in Africa and the Pacific. The later criminalisation of all sexual activity between men coincided with the high tide of Britain's empire. As a result, offences regarding same-sex sexual activity between men were imposed in Britain's colonies across the world. Sometimes the terminology differed. For example, some statutes referred to 'sodomy' or 'carnal knowledge against the order of nature' or 'intercourse against the order of nature'. However described, the disproportionate application of these laws to men who had sex with men continued. The laws further stigmatised men who have sex with men through the use of derogatory language, such as 'the abominable crime of buggery', and association with criminal sanctions against sex with animals. In 1966, these laws were in place across the Commonwealth.

Full versus partial decriminalisation

- 9.11 In 1967, the UK partially decriminalised sex between consenting adult men in private. However, the British Parliament left in place (or created) other laws that disproportionately and negatively affected LGBT+ people, such as unequal ages of consent. These laws were only repealed in the UK at the beginning of the 21st century. The UK's incremental approach to law reform meant it took decades to achieve full decriminalisation.
- 9.12 Between 1967 and the late 1990s, most Commonwealth jurisdictions that decriminalised same-sex sexual activity were Global North countries, but they chose to follow the UK's example and only partially decriminalised. They may have repealed or reformed their buggery and indecency offences, but they left other laws in place that disproportionately affect LGBT+ people. In addition to imposing a higher age of consent, either for all sexual activity between men or only for anal sex, many also had discriminatory laws on soliciting and offences against public morality. Some also kept or made offences related to public discussion of homosexuality, including, for example, sexual health education and law reform advocacy. This was the approach taken in Canada and the Australian states of Victoria and Western Australia, for instance. On average, it took 20 years for these jurisdictions to complete the decriminalisation process, and in some cases much longer.¹¹⁹

The impact of criminalising same-sex sexual activity

- 9.13 There is extensive literature and an ever-growing body of empirical research on the adverse effect of laws against same-sex sexual activity. For example, as the UN High Commissioner for Human Rights has stated:

The existence of criminal laws of this kind poses a serious threat to the fundamental rights of LGBTI individuals, exposing them to the risk of arrest, detention and, in some cases, torture and execution. Commonly, criminal sanctions are accompanied by a raft of other discriminatory measures that affect access to a wide range of rights—civil, political, economic, social and cultural. We also know that criminalization perpetuates stigma and contributes to a climate of homophobia, intolerance and violence directed against LGBTI individuals.¹²⁰

9.14 Some of the serious harms caused by criminalisation include:

- violence and the fear of violence, including murder;
- discrimination and harassment in all areas of life;
- unlawful detention and state persecution;
- criminal prosecution, imprisonment, the death penalty or corporal punishment;
- rape/sexual assault, including so-called “corrective” rape of lesbians;
- extortion and blackmail;
- eviction from property;
- family rejection and isolation;
- removal of children from, and denial of custody of children to, lesbian, bisexual and trans women;
- exclusion from public policy development in areas including health, education and policing;
- limited access to basic services, including health, education and legal services;
- poor health, including:
 - o depression, self-harm and suicide; and
 - o increased risk of HIV/AIDS, sexually transmitted infections (STIs), and poor sexual and reproductive health in general—for example:
 - in the non-Commonwealth Caribbean, where same-sex sexual activity is not criminalised, the HIV prevalence rate for men who have sex with men is 1 in 15, whereas in the Commonwealth Caribbean, where same-sex sexual activity is criminalised, it rockets to 1 in 4;¹²¹
 - lesbians, often forced or pressured into heterosexual marriages, may have little or no control over their sexual and reproductive health and rights.¹²²

9.15 There is evidence that partial decriminalisation results in many of the same harmful effects. The following list is not comprehensive. Most jurisdictions that have only partially decriminalised continue to experience these problems.

- **United Kingdom:** As a political compromise for decriminalisation, the UK created a minimum age of consent for male sex of 21 years. Prior to that, there was no age of consent for same-sex sexual activity. This age of consent was significantly higher than for heterosexual sex, which was 16 years of age. The penalties for underage same-sex sexual activity were also increased. This led to the harassment, arrest and stigmatisation of gay youth, as well as poorer social and health outcomes.¹²³
- **Canada:** There were 1,300 arrests of gay men under ‘bawdy house’ laws which were left in place in Canada following the decriminalisation of male sex in 1968.¹²⁴

- **Victoria, Australia:** The harassment of gay men in the Australian state of Victoria continued after decriminalisation in 1980 under new laws that criminalised 'soliciting for immoral purposes'.¹²⁵

- 9.16 In addition to individual harm, the criminalisation of same-sex sexual activity can also have a range of negative impacts on communities and countries as a whole, including on public health, education, rule of law, economic development, human rights, and anti-corruption measures. The criminalisation of same-sex sexual activity, therefore, is also in conflict with many key values and priorities of governments around the world, including in the Commonwealth.¹²⁶
- 9.17 The criminalisation of same-sex sexual activity harms all LGBT+ people across all areas of life, as the list of harms above demonstrates. However, these impacts can be experienced differently, depending on a range of factors, including the social status different LGBT+ people occupy. For example, LGBT+ people who are members of other marginalised or discriminated-against groups, such as women, people with disability and Indigenous people, may suffer intersecting forms of discrimination, because they are both a sexual minority and a member of another marginalised group.¹²⁷

Sources for the criteria for good practice: consensual same-sex sexual activity

*Application of international human rights law is guided by the fundamental principles of universality, equality and non-discrimination. All human beings, irrespective of their sexual orientation and gender identity, are entitled to enjoy the protection of international human rights law with respect to the rights to life, security of person and privacy, to freedom from torture and ill-treatment, discrimination and arbitrary arrest and detention, and to freedom of expression, association and peaceful assembly, and all other civil, political, economic, social and cultural rights.*¹²⁸

- 9.18 States have well-established obligations to respect, protect and fulfil the human rights of all persons within their jurisdiction, including LGBT+ people, such as the fundamental principle of human dignity and rights of non-discrimination, equality before the law, and privacy. These rights can be found in each regional and UN human rights treaty.
- 9.19 At a regional level, the European Court of Human Rights has found that laws criminalising same-sex sexual activity violate the right to privacy under the *European Convention on Human Rights*.¹²⁹ The cases establishing this principle both came from the Commonwealth, namely *Dudgeon v United Kingdom*¹³⁰ and *Modinos v Cyprus*.¹³¹ These cases are briefly discussed below.

- 9.20 The UN Human Rights Committee has also been very clear that these principles prohibit criminalisation of LGBT+ people. For example, in its landmark decision in *Toonen v Australia*¹³² (**Toonen**) in 1994, the Committee found that a Tasmanian law criminalising sexual activity between men violated the right to privacy and non-discrimination under the ICCPR, regardless of whether the law was enforced.

*Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the 'reasonableness' test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.*¹³³

- 9.21 Since *Toonen*, other UN bodies have repeatedly urged states to reform laws criminalising consensual same-sex sexual activity because they violate fundamental human rights norms.¹³⁴
- 9.22 Multiple national courts in the Commonwealth have also held that laws criminalising consensual same-sex sexual activity violate domestic constitutional human rights protections. These national court decisions have both built on the precedents set in the above cases and moved beyond them. While the above decisions focussed chiefly on privacy, more recent decisions in the Commonwealth's Global South have cited the right to equality as a right violated by laws criminalising same-sex sexual activity. This trend began with South Africa in 1998, and can be seen in all subsequent Commonwealth Global South court decisions, including in Fiji, Belize, India, and Trinidad and Tobago (for more, see the Indian case study in Part B).
- 9.23 Reinforcing the impact of these decisions have been a number of important declarations. These include:
- the African Commission on Human and Peoples' Rights *Resolution 275 on protection against violence on the grounds of sexual orientation and gender identity*, which called for an end to the arrest and detention of LGBT+ people;¹³⁵
 - the 2016 report from the UN Special Rapporteur on Torture, Juan Mendez, linking the criminalisation of same-sex sexual activity to increased violence against LGBT+ people;

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.*¹³⁶

- the *Yogyakarta Principles plus 10*, which make an unequivocal case for decriminalisation.¹³⁷

*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.*¹³⁸

Criteria for good practice consensual same-sex sexual activity

9.24 The first and most important criterion for a good practice legal framework in the context of consensual same-sex sexual activity is complete decriminalisation. Partial decriminalisation cannot be good practice, as it leaves in place laws that continue to criminalise and stigmatise LGBT+ people and their consensual, private sexual conduct, or which affect them unequally because they are LGBT+. A legal framework that retains even some laws that operate to criminalise any aspect of LGBT+ people or activity cannot be human rights compliant. Good practice therefore requires that:

- sexual offences laws do not discriminate on the basis of sexual orientation or gender identity;
- private, consensual, adult sexual activity is not criminalised;
- reform is complete and all laws criminalising same-sex sexual activity are invalidated by a court or repealed or reformed by parliament, including laws on privacy and age of consent. For example, there should be no laws imposing a higher age of consent for same-sex sexual activity (including laws that, on their face, are gender-neutral but, in their application, criminalise sexual acts that are most closely associated with LGBT+ people, such as anal intercourse), no laws that treat same-sex rape/sexual assault as less serious, and no laws against the so-called 'promotion' of homosexuality;
- no other laws, such as loitering, debauchery, vagrancy or other public morality laws, are used indirectly to criminalise same-sex sexual activity; and
- sexual offences laws are not used to target LGBT+ people.

9.25 Some countries have fully decriminalised through a decision of a superior court that invalidates relevant criminal provisions, which typically has immediate effect and does not technically require any further action by lawmakers. Ideally, however, these decisions should be followed by legislative repeal of those provisions, particularly to ensure that mistakes cannot be made in applying the criminal law as a result of ignorance of the court decision. However, in some countries, this may be slow to occur.

FIGURE 11: Criteria for good practice: Consensual same-sex sexual activity

1. Equality and non-discrimination

a. No legislation criminalising same sex sexual activity:

Consensual same sex sexual activity in private should not be criminalised. This includes ensuring the following offences, however described, are no longer criminalised when in private, whether through statute or common law:

- indecency between people of the same sex,
- carnal knowledge/intercourse against the order of nature,
- buggery,
- sodomy,
- homosexuality,
- lesbianism,
- same-sex sexual relations, and
- fellatio or cunnilingus.

b. No other discriminatory sexual offences laws: There should be no other sexual offences laws that directly or indirectly discriminate on the ground of sexual orientation. These laws include, but are not limited to:

- age of consent laws that set different ages for consensual same-sex and heterosexual sexual activity, or for sexual acts that are particularly associated with either group;
- laws that restrict or prohibit so-called 'promotion' of homosexuality, such as information on HIV/AIDS, sexual education, support for LGBT+ people or law reform campaigns; and
- any other public morality laws used to indirectly criminalise same-sex sexual activity, such as loitering, debauchery and vagrancy laws.

c. Non-discriminatory implementation and policing: Laws that are neutral on their face, including sexual offences, must not be implemented or enforced in a discriminatory way so as to disproportionately and negatively affect LGBT+ people. Such laws must not be used to criminalise or stigmatise LGBT+.

2. Dignity and respect

No discriminatory language used in the law: Sexual offences laws should not use any language or terminology that is discriminatory, derogatory, offensive, or stigmatising to LGBT+ people. For example, 'buggery', 'sodomy', 'intercourse against the order of nature', 'indecency between male/female persons' and 'abominable crime'.

3. In Commonwealth nations that have decriminalised through court decision and not through reform of legislation, the following additional criteria apply

Respect the decision: Government respects and enforces the decision.
In particular:

- **No arrests:** Policy directives should be implemented in order to ensure no further arrests, prosecutions or convictions for same-sex sexual activity between consenting adults in private as inconsistent with the court decision;
- **Legislative reform:** Government should remove any legislative provisions that were struck down by the court for criminalising consensual same-sex sexual activity.

- 111 Kaleidoscope Trust & The Royal Commonwealth Society, *A Commonwealth Toolkit for Policy Progress on LGBT Rights* (2016) 4 (emphasis added) <<https://thercs.org/news-and-blogs/blogs/a-commonwealth-toolkit-for-policy-progress-on-lgbt-rights-report-launch/>> (last accessed March 2019).
- 112 These are Vanuatu, Bahamas, Fiji, Lesotho, Mozambique, Seychelles, Belize, Nauru, India, Trinidad and Tobago, compared to only Bermuda and South Africa before that.
- 113 Mozambique, Seychelles, Belize, Nauru, India, Trinidad and Tobago.
- 114 Trinidad and Tobago, Solomon Islands, Barbados, Sri Lanka, Malaysia, Botswana, Gambia, Zambia, Malawi. Human Dignity Trust, *Breaking the Silence, Criminalisation of Lesbians and Bisexual Women and its Impacts (Breaking the Silence)* (2016) <<https://www.humandignitytrust.org/lgbt-the-law/>> (last accessed March 2019).
- 115 Ibid.
- 116 Ibid. Also, Map of Countries that Criminalise LGBT People, Human Dignity Trust, https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter=crim_sex_women
- 117 Antigua & Barbuda ('gross indecency' between persons); Barbados ('gross indecency' between persons); Brunei ('musahaqah' "any physical activities between a woman and another woman which would amount to sexual acts if it is done between a man and a woman, other than penetration"; (Syariah Penal Code Order 2013 implemented on 3 April 2019); Cameroon ('sexual relations with a person of the same sex'); Dominica ('gross indecency' between persons); The Gambia ('gross indecency' between women); Malawi ('gross indecency' between women); Malaysia ('gross indecency' between persons); Nigeria ('gross indecency' between persons & 'lesbianism'; St. Lucia ('gross indecency' between persons); St. Vincent & the Grenadines ('gross indecency' between persons); Solomon Islands ('gross indecency' between persons); Sri Lanka ('gross indecency' between persons); Tanzania ('gross indecency' between persons & 'lesbianism'; Uganda ('gross indecency' between persons); Zambia ('gross indecency' between women).
- 118 Human Dignity Trust, above n114.
- 119 For example, Canada only repealed bawdy house laws, which have been used to target gay men in bath houses, and laws providing a higher age of consent for consensual anal sex in 2019, some 50 years after same-sex sexual activity was partially decriminalised.
- 120 Navi Pillai, 'Ending violence and criminal sanctions based on sexual orientation and gender identity: Statement by the High Commissioner [for Human Rights]' (Speech delivered at the Human Rights Council meeting in Geneva on 17 September 2010) <<https://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10717&LangID=E>> (last accessed March 2019).
- 121 UNAIDS, *08 Report on the global AIDS epidemic, Executive Summary*, UN Doc UNAIDS/08.27E/JC1511E (July 2008) <http://data.unaids.org/pub/globalreport/2008/jc1511_gr08_executivesummary_en.pdf> (last accessed March 2019); UNAIDS, *Keeping Score II: A Progress Report towards Universal Access to HIV Prevention, Treatment, Care and Support in the Caribbean* (2008) <http://www.unaids.org/en/resources/documents/2008/20081125_20081206_keepingcoreii_en.pdf> (last accessed March 2019).
- 122 Human Dignity Trust, above n114, 23.
- 123 Helena Jeffs, 'Age of Consent' for Male Homosexual Acts (Research Paper No. 98/68, UK House of Commons, 1998) from 41 <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP98-68>> (last accessed March 2019).
- 124 The men were charged with this offence for being in a gay bathhouse. In some cases, this law was used to raid bars and private homes. Patrizia Gentile, Tom Hooper, Gary Kinsman, & Steven Maynard, *Another Limited Bill, Gay and Lesbian Historians on C-75* (2018) 2 <<https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10002313/br-external/HooperTom-e.pdf>> (last accessed March 2019).

- 125 "In the years following the 1981 reform in Victoria, the gay press reported frequent instances of police harassing gay men in public places. While 'soliciting for immoral sexual purposes' was not the only law that enabled such harassment ('offensive behaviour' was known to be used as well), the new soliciting law provided a convenient substitute for police who previously used the specifically anti-homosexual soliciting and loitering laws." Graham Carbery, *Towards Homosexual Equality in Australian Criminal Law – A brief history* (Australian Lesbian & Gay Archives, Melbourne, 1993, revised 2014) 13–14 <<http://www.alga.org.au/files/towardsequality2ed.pdf>> (last accessed March 2019).
- 126 Human Dignity Trust, *Criminalising Homosexuality: Irreconcilable with Good Governance, Synopsis of Our Recommendations* (2016) [4] <<https://www.humandignitytrust.org/wp-content/uploads/resources/Criminalisation-of-Homosexuality-and-Good-Governance-1.pdf>> (last accessed March 2019).
- 127 Human Dignity Trust, above n114, 6.
- 128 *Discrimination and violence against individuals based on their sexual orientation and gender identity Report of the Office of the United Nations High Commissioner for Human Rights*, 29th sess, Agenda Items 2 and 8, UN Doc A/HRC/29/23 (4 May 2015) [9] (Discrimination and Violence Report) <<https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNReports.aspx>> (last accessed March 2019).
- 129 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>> (last accessed March 2019).
- 130 Ibid.
- 131 *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>> (last accessed March 2019).
- 132 *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>> (last accessed March 2019).
- 133 Ibid [8.6].
- 134 See, for example, UN Commission on Human Rights, Promotion and Protection of Human Rights: 2003/... *Human rights and sexual orientation*, 59th sess, Agenda Item 17, UN Doc E/CN.4/2003/L.92 (17 April 2003) <<https://undocs.org/en/E/CN.4/2003/L.92>>; H E Wegger Christian Strømmen, 2006 Joint State: 3rd session of the Human Rights Council (1 December 2006) ARC International <<http://arc-international.net/global-advocacy/sogi-statements/2006-joint-state-ment/>> (last accessed May 2019); 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://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/165/78/PDF/G1116578.pdf?OpenElement>> (last accessed May 2019).
- 135 African Commission on Human and Peoples' Rights, 275: *Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity* (2014) <<http://www.achpr.org/sessions/55th/resolutions/275>> (last accessed March 2019).
- 136 UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 31st sess, Agenda Item 3, UN Doc A/HRC/31/57 (5 January 2016) [15] <<https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session31/pages/listreports.aspx>> (last accessed March 2019).
- 137 *Yogyakarta Principles plus 10*, above n9.
- 138 Office of the High Commissioner for Human Rights, above n128, [43].

10. Age of consent to sexual activity

- 10.1 Age of consent laws effectively determine that children and young people below the age of consent have not reached the level of general maturity needed for their safe participation in sexual activities. The law considers that they are not able to freely and voluntarily consent to sexual activity due to their age. Sexual activity with children who are under the age of consent is therefore a criminal offence (e.g. statutory rape) in all jurisdictions of the Commonwealth.
- 10.2 At the same time, children and young people below the age of consent have a right to privacy and healthy sexual development. When children who are close in age engage in genuinely consensual sexual activity, they should not be criminalised. 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.

Sources for the criteria for good practice: age of consent laws

Discrimination

- 10.3 The legal age at which a person can consent to have sex varies across the world, and across the Commonwealth. Many countries prescribe different ages of consent depending on the gender of the person and on the type of sexual activity engaged in, including whether it is sexual activity involving people of the same sex or different sexes. This approach violates the core principles of equality and non-discrimination that are also central to achieving good practice in laws dealing with the age at which a person can consent to sexual activity.
- 10.4 Furthermore, as was explored in the previous section, international law prohibits the criminalisation of same-sex sexual activity, including different ages of consent for same-sex and opposite-sex sexual activity. Such laws have been found to violate non-discrimination provisions by both national and regional courts, including the European Court of Human Rights.¹³⁹
- 10.5 In line with the principles of non-discrimination found in international human rights treaties, the minimum age of consent to sexual activity must be the same for both boys and girls.¹⁴⁰

Minimum age

- 10.6 Although international law is clear that the minimum marriage age is 18 years,¹⁴¹ there is no clear consensus on the appropriate age at which a person should be legally permitted to consent to sexual activity. While 16 is the most common age of consent set by jurisdictions within the Commonwealth, other countries have set it lower than 16, which is not good practice. Others have a higher age of consent, for example 18 years, which is consistent with the definition of a child under the CRC.¹⁴²

- 10.7 The UN Committee on the Rights of the Child has declared that the minimum age must be clearly stated in domestic law.¹⁴³ It has also advised that the age of consent should neither be too low nor too high and that, in setting the age of consent:

States parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.¹⁴⁴

Effect of marriage

- 10.8 There must be no exemption to the statutory age of consent to sexual activity on the basis of marital status. Furthermore, given that international law is clear that the appropriate minimum age of marriage is 18, laws which permit marriage at a lower age are not human rights compliant and fail to meet good practice standards. This is of even greater concern in jurisdictions where there is a marital exemption to age of consent provisions.

Defences

- 10.9 Some states apply a 'close-in-age' exception to age of consent provisions (sometimes known as the 'Romeo and Juliet defence') where one or both participants are under the age of consent. This exception is usually available as a defence to child sexual assault to avoid criminalising genuinely consensual sexual activity between young people who are close in age. This applies, for example, where one person is 16 years and the other is only a few years older, e.g. 2–5 years, provided there is no relationship of trust, authority or dependency between the two people. The UN Committee on the Rights of the Child has endorsed this approach, recommending that states should avoid criminalising adolescents of similar ages who engage in factually consensual and non-exploitative sexual activity.¹⁴⁵
- 10.10 This approach is taken in Canada, for example, where there is an exemption to the general age of consent of 16 when one party is 12 or 13-years-old and the other less than two years older, or when one party is 14 or 15-years-old and the other less than five years older.¹⁴⁶ Close-in-age defences must be explicitly provided for under sexual offences legislation to meet good practice standards.

Criteria for good practice age of consent laws

- 10.11 Drawing on fundamental human rights principles, including those specific to the rights of the child under the CRC, it is clear that, for age of consent laws to meet good practice criteria, they must at the very least be non-discriminatory and equal for everyone, regardless of the gender, disability status, sexual orientation and marital status of those involved. There must also be equity in the age of consent to same-sex and opposite-sex sexual activity. Further, there must be equal ages of consent for specific types of sex, including those that are typically associated with a particular sexual orientation, such as anal intercourse, to avoid any discriminatory effect.
- 10.12 While there is no clear consensus on a good practice minimum age of consent, it is recommended here that, having regard to human rights standards, the minimum age of consent to sexual activity be set between 16 and 18 years. This must be accompanied by close-in-age defences where one or both participants are under the age of consent, provided that there is no relationship of trust, authority, supervision or dependency between the parties

FIGURE 12: Criteria for good practice: Age of consent to sexual activity

1. Equality and non-discrimination

a. Gender-neutral:

- The age of consent to sexual activity should be gender-neutral. That is, the age at which a person can legally consent to sexual activity should be the same for everyone, irrespective of their gender.

b. Disability-neutral:

- The age of consent to sexual activity should be disability-neutral. That is, the age at which a person can legally consent to sexual activity should be the same for everyone, irrespective of whether or not they have disability.

c. Sexual orientation-neutral:

- The age of consent to sexual activity should be sexual orientation-neutral. That is, the age at which a person can legally consent to sexual activity should be the same for everyone, irrespective of whether or not they are engaging in same-sex sexual activity. This includes ages of consent for sexual conduct that is more closely associated with persons of a particular sexual orientation, such as anal intercourse.

2. Dignity and respect

a. Respects autonomy:

- The decision-making autonomy of the person must be respected. As such, no consent to sexual activity can be given by a person other than the person themselves.
- The minimum age at which a person can consent to sexual activity is between 16 and 18 years, with a close-in-age exception provided where one or both participants are under the age of consent and provided that there is no relationship of trust, authority, supervision or dependency between the parties.

b. No parental consent:

- No consent to a person engaging in sexual activity can be given by a person's parent or guardian.

3. Full and free consent

Consent must be freely given:

- Consent to sexual activity must be the full and free consent of the persons themselves.

4. Defences and exceptions

a. No defence relating to parental consent:

- The consent of a person's parent or guardian is not a defence to non-consensual sexual activity or sexual activity under the statutory age of consent.

b. 'Close-in-age' defence provided:

- Consensual sexual relations between young people who are close in age and where one or both are under the age of consent is not criminalised and provided that there is no relationship of trust, authority, supervision or dependency between the parties.

c. No exception for religious or cultural laws:

- There must not be exceptions for religious or cultural laws, customs or practices to the statutory minimum age of consent to sexual activity.

d. No exception for marriage:

- There must be no exceptions where the parties are married under laws which permit marriage at a younger age than the age of consent to sexual activity.

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- 139 See for example *Sutherland v the United Kingdom* (Application no. 25186/94) European Commission of Human Rights (1 July 1997) <[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-45912%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-45912%22]})> (last accessed May 2019).
- 140 Committee on the Rights of the Child, *General Comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4 (1 July 2003) [9] <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f4&Lang=en>.
- 141 Committee on the Elimination of Discrimination Against Women, *General Comment No 21 Equality in marriage and family relations*, 13th sess (1994) [36] <[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38\(SUPP\)_4733_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38(SUPP)_4733_E.pdf)> (last accessed September 2019); Committee on the Elimination of Discrimination Against Women and Committee on the Rights of the Child, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices*, UN Doc CEDAW/C/GC/31-CRC/C/GC/18 (14 November 2014) [20] <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/78/PDF/N1462778.pdf?OpenElement>> (last accessed September 2019).
- 142 *Convention on the Rights of the Child*, article 1.
- 143 Committee on the Rights of the Child, *General Comment No 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4 (1 July 2003) [9] <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f4&Lang=en> (last accessed September 2019).
- 144 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] <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f20&Lang=en> (last accessed September 2019); 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.
- 145 *Ibid* [40].
- 146 *Criminal Code 1985* (Canada) s 150.1(2) & (2.1).

Part B:

Case Studies of Good Practice Laws

This Part contains several examples of good practice laws in the areas covered in this report. It describes how the relevant law, both substantive criminal provisions and, where relevant, rules of procedure and evidence, meet good practice criteria. It also identifies some areas in which the law needs to be strengthened, as well as some of the challenges to its full implementation identified by local experts interviewed for this report.

The country case studies do not purport to be comprehensive analyses of the laws of the country. Every care has been taken to ensure that the information provided is accurate and up-to-date based on publicly available legal databases. It should not be relied on as definitive. Local legal experts in the countries considered here should be contacted for more information about the laws and their operation.

11. Rape/sexual assault laws

The Pacific: Fiji[‡]

Fiji's legislative framework on rape/sexual assault

- 11.1 Fiji's criminal laws on rape¹⁴⁷ are found in the *Crimes Act 2009* (in this section, the **Crimes Act**) and the *Criminal Procedure Act 2009* (in this section, the **Procedure Act**).¹⁴⁸

CRIMES ACT 2009

Definition of rape

- 11.2 Section 207 in Part 12 of the *Crimes Act*, covering 'sexual offences,' creates the offence of rape, sets the maximum penalty (life imprisonment), and describes the elements of the crime. It states:

207

[...]

(2) A person rapes another person if –

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

(3) The term 'penetrate' does not include penetrate for a proper medical, hygienic or law enforcement purpose only.

(4) If 'carnal knowledge' is used in defining an offence, the offence, so far as regards that element of it, is complete on penetration to any extent.

(5) 'Carnal knowledge' includes sodomy.

[...]

- 11.3 In Fiji, rape is non-consensual:

- 'carnal knowledge': penetration, 'to any extent', of a vagina by a penis, or an anus by a penis; or
- penetration, 'to any extent', of genitalia or anus by a penis or another object, or the mouth by a penis.

[‡] This is a summary only; it is not a comprehensive description or analysis of Fiji's laws.

- 11.4 This definition of rape meets the identified good practice criteria as it covers a wide range of sexually penetrative conduct and is not limited to penetration of a vagina by a penis. It explicitly includes rape by non-consensual penetration of the anus with a penis ('sodomy') or an object.
- 11.5 Under the former Fijian *Penal Code*, only women could be raped and only men could commit rape, as it required non-consensual vaginal sexual intercourse. Only two circumstances were included in which consent could not be given:
- use or threat of force, or
 - deception as to the nature of the act or the identity of the perpetrator.
- 11.6 This was a standard formula for rape, and one that is still in place in many countries that have not yet reformed their law.
- Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.¹⁴⁹
- 11.7 The language in paragraph 207(2)(a)—'carnal knowledge'—could be improved. This term is archaic and a leftover from the former Penal Code. The formulation in sections 207(2)(b) and (c) is better, and meets good practice because it uses plain English, clearly describing the prohibited conduct in language that has no moralistic overtones.
- 11.8 Other aspects of the definition that makes this a good practice rape law are that:
- it is gender-neutral: a person of any sex or gender, including trans women and men, can be raped or commit rape;
 - it makes clear that 'penis', 'vagina' and 'vulva' include where they have been surgically constructed 'whether provided for a male or female', ensuring, for example, that trans people are not excluded from the crime: section 206(7);
 - it specifies that 'penetration' for the purposes of rape includes penetration, no matter how slight, or, in the words of the Act, 'to any extent': section 206(4).

Consent

- 11.9 The Act also defines consent appropriately, as follows:
- 'freely and voluntarily given agreement by a person with the mental capacity to consent, without threats or abuse of authority or power'; and
 - it requires a person to actively give their agreement: submitting or acquiescing to the sexual act is not consent.

The term ‘consent’ means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent [...]

Section 206(1) *Fiji Crimes Act*

- 11.10 The definition of rape in the *Crimes Act* includes that it is not necessary for the victim/survivor to show they physically resisted the rape to prove lack of consent. Under the Fiji law, absence of any evidence that the victim/survivor did not physically resist the rape cannot, on its own, equal consent:

[...] submission without physical resistance by a person to an act of another person shall not alone constitute consent [...]¹⁵⁰

- 11.11 The law recognises that, in many circumstances, a victim/survivor may feel threatened or coerced and does not or cannot physically resist the assault. It also recognises that different victims/survivors react to sexual assault in different ways. There is no ‘correct’ response, and the law should never prescribe a lack of physical resistance to sexual violence as consent.

- 11.12 A wide range of situations in which consent can never be freely or voluntarily given are listed in section 206(2):

Without limiting sub-section (1), a person’s consent to an act is not freely and voluntarily given if it is obtained—

- by force; or
- by threat or intimidation; or
- by fear of bodily harm; or
- by exercise of authority; or
- by false and fraudulent representations about the nature or purpose of the act; or
- by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.

- 11.13 In any of these situations, a person cannot consent to sexual intercourse under law, even if they believe they have consented. This is an inclusive list, which means that if circumstances other than those on the list apply, a court could still find that the victim/survivor could not have given free and voluntary consent to the sexual act in those circumstances.

- 11.14 The High Court case of *State v Vakadravu*¹⁵¹ illustrates how the consent law works.

FIGURE 13: Case summary – *State v Vakadranu* (Fiji High Court) – How the law on consent is applied

State v Vakadranu, Fiji High Court, 2016

Free and voluntary consent

Mr Vakadranu (**defendant**), a pastor, was prosecuted for rape of two young women members of his congregation. He did not deny the acts. He said both women gave their consent.

One of the two women (**A**) gave evidence that she had consented. However, she also said that she consented because:

*she believed in the accused who was the leader of the church she is a member of, who told her that he is preparing her for a mission where she has to preach the word of God to the world [against adultery] and she cannot preach something she has not experienced.*¹⁵²

The Prosecutor argued this consent was not 'freely and voluntarily' given because A was deceived by the defendant.

The Court agreed, and said there was no free and voluntary consent by A and that the accused knew that fact. It said:

*[A] did not freely and voluntarily give her consent as it was obtained by the accused due to the false and fraudulent representation about the nature and purpose of the act and by exercising his authority over her. Given that it is proven that Mr Vakadranu deceived her, it is also proven that he knew and believed that she was not consenting freely and voluntarily.*¹⁵³

Submission without physical resistance does not equal consent

The second young woman (**B**) gave evidence that she did not consent to sexual intercourse with the defendant. She said that he 'had taught her that he is their doctor and he is their spouse' and that God had appointed him to perform the sexual act. She did what he asked her to do and did not physically resist.

The Court decided that the fact that the defendant performed sexual intercourse on B without physical resistance does not amount to consent.¹⁵⁴

No consent: exercise of authority, and false and fraudulent representations

The High Court decided that B submitted to 'carnal knowledge' with the accused because he had exercised his authority over her as her pastor, whom she believed and trusted. The Court said that:

- the fact that B did not complain about the matter for two years does not affect the credibility and the reliability of her evidence on the issue of consent;

- the accused knew or believed that B was not consenting, even though she did not physically resist, and that is why he deceived her and told her that God had appointed him to perform that act on her;
- the defendant 'was aware of the risk that [B] may not be consenting [...] and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate [B's] vagina with his penis.'¹⁵⁵

No consent under 'coercive control'

- 11.15 Some interviewees suggested a further coercive circumstance be added to the list in section 206(2) to reflect the fact that many women are raped by their husbands or partners as part of an overall situation of family/domestic violence in which the husband exercises coercive control over his wife. Coercive control is a wide-reaching form of abuse, and, as control is at the heart of all domestic abuse, it overlaps with many other categories, especially sexual abuse and financial abuse. Exercising coercive control is part of the definition of domestic or family violence in some jurisdictions, including, for example, in *Australia's Family Law Act 1975*, which defines 'family violence' as including violent and other behaviour that 'coerces or controls' a member of the perpetrator's family.¹⁵⁶
- 11.16 Adding this circumstance to section 206(2) would strengthen Fiji's rape law, ensure that the law is responding to one of the most common circumstances in which women are raped,¹⁵⁷ and would make it clear that rape by husbands and domestic partners, including in the context of domestic violence, is a serious sexual offence.

Marital rape

- 11.17 There is no exception in the *Crimes Act 2009* for so-called marital rape; the Act is silent on this. The principle was confirmed by the Fiji Court of Appeal in *Ismail v State*.¹⁵⁸ In this case, the Court held that 'the common law immunity for marital rape has been abolished and is no longer part of the law in England or Fiji'.¹⁵⁹ It said:

The fact that the victim was the appellant's wife did not give him a licence to rape her. The victim did not consent to any of the alleged sexual acts. In these circumstances, the appellant was not immune from prosecution because of his marital status with the victim.¹⁶⁰

- 11.18 However, a number of interviewees noted that there is still the widespread belief among many people that wives are the property of their husbands and that they cannot refuse sex. They said that the *Crimes Act* should be amended to explicitly exclude a marital rape exception to help put the matter beyond doubt and help change social attitudes.

Specific sexual offences against children

- 11.19 Specific sexual offences against children under the *Crimes Act* include:
- defilement (carnal knowledge) of children under 13 years of age (section 214); and
 - defilement (carnal knowledge) of a young person between 13 and 16 years of age (section 215).
- 11.20 ‘Defilement’ is an archaic term meaning ‘to pollute’ or ‘to sully’. In the context of sexual offences, it refers to sexual assault of minors. It is often linked to cultural and religious importance given to the virginity of unmarried girls in many societies.
- 11.21 The defilement offences under Fiji’s *Crimes Act* are gender-neutral, and involve the same underlying conduct as rape – non-consensual carnal knowledge, or penetration, to any extent, of a vagina by a penis or an anus by a penis. However, they are not aligned with the general rape/sexual assault provisions, and may not meet the good practice criteria. For example, attempted rape is punishable by imprisonment for 10 years (section 208), while attempted defilement of a child under the age of 13 years is punishable by imprisonment for five years. Note that the age of consent for males and females in Fiji is 18.
- 11.22 To meet the good practice criteria, these provisions should be updated to align with the principles underlying the offence of rape, and should use neutral, plain language that clearly describes the prohibited conduct as a violent assault.

Defences

- 11.23 The *Crimes Act* provides for a defence of mistaken belief of facts ‘for an offence that has a physical element’, such as rape, if the court decides that the mistaken belief ‘was reasonable in the circumstances’ (section 34). The Act also rules out a defence of intoxication to a charge of rape if the intoxication was self-induced.

Penalties

- 11.24 The maximum penalty for rape under the *Crimes Act*—life imprisonment—reflects the gravity of the crime, and excludes the death penalty and corporal punishment. Before its repeal, the Fijian Penal Code did include corporal punishment for rape.
- 11.25 Interviewees working with complainants said, anecdotally, that it appears courts are giving harsher penalties for rape, especially at the appellate level, and especially for offences involving children. For example, in 2018, the Chief Justice of the Supreme Court increased the penalty range (the **tariff**) for child rape offences from 10 to 16 years’ imprisonment to 11 to 20 years’ imprisonment.¹⁶¹ The Chief Justice, Anthony Gates, explained:

The increasing prevalence of these crimes, crimes characterised by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. It will be for judges to exercise their discretion taking into account the age group of these child victims. I do not for myself believe that that judicial discretion should be shackled. But it is obvious to state that crimes like these on the youngest children are the most abhorrent.¹⁶²

- 11.26 In another example, in December 2018, the High Court sentenced a man to life imprisonment for the multiple rapes of his two daughters over many years, and of his granddaughter, who was conceived through rape. This was the first time the maximum penalty for rape had been imposed.¹⁶³

CRIMINAL PROCEDURE ACT 2009

- 11.27 The Fijian *Criminal Procedure Act 2009* sets out procedures for criminal cases under, among other statutes, the *Crimes Act 2009*.

Rules of evidence

- 11.28 **No corroboration:** The *Procedure Act* removes the common law rule requiring corroboration of a rape complainant's testimony (section 129). This enacts an important ruling in the Fijian Court of Appeal in 2004 in *Balelala v State*.¹⁶⁴ (*Balelala*) against the corroboration rule. Although it was not part of the old Fijian Penal Code, the rule had been enforced in Fiji as a long-standing practice under the common law.¹⁶⁵ In *Balelala*, the Court of Appeal found that the rule was based on the law in force in England in 1944, when the Fijian evidence law was enacted. The Court said that the rule:

was based on an outmoded and fundamentally flawed rationale, which was unfairly demeaning to women because in most jurisdictions rape and other sexual offences were crimes against women. The corroboration rule put women—when victims of sexual offences—in a special category of suspect witnesses. This had the effect of giving the accused protection that did not apply in other cases of serious criminality and almost certainly had the effect of deterring many rape victims from reporting offences committed against them.¹⁶⁶

FIGURE 14: Case summary – *Balelala v State* (Fiji Court of Appeal) – The end of the corroboration rule in Fiji

***Balelala v State* and the end of the corroboration rule in Fiji**

The Fiji Court of Appeal made the following findings in relation to the corroboration rule:

- The rule discriminated against women who were victims of sexual violence, in violation of article 38(1) of the Fiji 1997 *Constitution*;
- The requirements under Fiji's Bill of Rights to promote the values that underlie a democratic society based on freedom and equality and to have regard to public international law applicable to the rights set out in the Bill of Rights required it to do away with the corroboration warning. CEDAW was cited as prohibiting any form of discrimination against women; and
- Eliminating the rule placed complainants' testimony regarding sexual assault on an equal footing with testimony offered by victims of other crimes.

The Court noted that legislation might be necessary to put any doubt about whether the rule still operated to rest. Section 129 of the *Criminal Procedure Act* does just that.

- 11.29 **Evidence of past sexual history not admissible:** The *Procedure Act* establishes a presumption against allowing evidence of a complainant's past sexual conduct or their reputation in sexual matters (section 130). Evidence of past sexual activity with someone other than the accused is only admissible with the court's consent, and if it satisfies the following conditions:
- it is directly relevant to facts that are in issue in the proceedings; or
 - it is directly relevant to a question of appropriate sentencing; and
 - excluding the evidence would be against the interests of justice (section 130(3)).
- 11.30 However, a court cannot allow this evidence if it is only being used to attack the reputation of the complainant in sexual matters (section 130(4)).

Rules of procedure – protective measures

- 11.31 Section 131 allows a judge or magistrate to authorise 'appropriate arrangements' for taking of evidence from a remote location, or 'the use of any other procedure or means by which evidence may be taken during, or for the purposes of the trial where issues of safety or the interests of justice require the use of such means.'
- 11.32 Section 296 of the *Procedure Act* covers a range of measures a court may order to protect a 'vulnerable witness', including allowing them to give evidence:
- by video recording,
 - by closed circuit television or video link,
 - from behind a screen or one-way glass so that they cannot see the accused, or
 - from another location.
- 11.33 The court must balance the need to ensure a fair trial for the accused with the need to minimise stress on the complainant (section 296(4)).

FIGURE 15: Summary of Fiji’s rape/sexual assault laws

Summary of Fiji’s legislative framework on rape/sexual assault ¹⁶⁷	
Crimes Act 2009	<ul style="list-style-type: none">▪ Creates the following sexual offences, all of which are gender-neutral and non-consensual:<ul style="list-style-type: none">▪ Rape, assault with intent to commit rape, sexual assaults and gross indecency (touching genitalia or anus), indecent assault, indecently insulting or annoying any person, defilement of intellectually impaired persons, procuration for unlawful purposes, and incest▪ Sexual offences specifically against children: abduction of person under 18 years of age with intent to have carnal knowledge, defilement (carnal knowledge) of children under 13 years of age, and defilement (carnal knowledge) of a young person between 13 and 16 years of age▪ Defines rape broadly as non-consensual carnal knowledge, or penetration by an object or body part other than a penis in the anus or vagina and the penis in the mouth▪ Defines ‘consent’ as ‘freely and voluntarily’ agreeing to sexual conduct▪ Specifies a wide range of circumstances when a person can never give free and voluntary consent, including abuse of authority▪ Specifies that ‘submission without physical resistance’ does not constitute consent▪ No exception for rape in marriage (confirmed by the Court of Appeal in <i>Ismail v State</i>¹⁶⁸)
Criminal Procedure Act 2009	<ul style="list-style-type: none">▪ Removes the common law rule of corroboration▪ Creates a presumption that evidence of the victim/survivor’s past sexual conduct, including with the accused person, is inadmissible▪ Allows courts to order a wide range of measures to protect the wellbeing and safety of a victim/survivor

Reform process

- 11.34 Until 2009, Fiji's Penal Code covered rape and other sexual assaults. The Penal Code was adopted in 1945, and was based on Indian law. Women's rights organisations in Fiji campaigned for decades for reform of these rape laws. A joint submission endorsed by 16 women's and community organisations was given to the Fiji Law Reform Commission by the Fiji Women's Rights Movement in about 1996, calling for immediate review of the rape legislation. The proposal, 'Draft Sexual Offences Legislation', expressed strong dissatisfaction with the laws governing rape and made proposals for reform.¹⁶⁹
- 11.35 The Fiji Government, acting on these concerns, appointed (now) Chief Justice of the Fiji Supreme Court, Anthony Gates, as Law Reform Commissioner to inquire and report on whether changes were needed to the Penal Code and the Criminal Procedure Code. In January 1999, the Commissioner issued draft recommendations for public review. Further public consultation was held in January and February 2000. There was much debate in correspondence columns in newspapers and feature articles in the press. This resulted in further submissions to the Commission before the final report was made to Government in 2000.¹⁷⁰
- 11.36 Military coups replaced the government in 2000 and then again in 2006, and the Law Reform Commission's recommendations were not progressed. In 2009, the military government issued decrees, bypassing the ordinary parliamentary law-making process. These included the *Crimes Decree* and the *Criminal Procedure Decree*, which contain the current law on rape and sexual assault, and the relevant rules of evidence and procedure outlined above. There was no consultation with the public or experts about the rape and sexual assault law.

Implementation of the law

Implementation is the problem, not the law¹⁷¹

- 11.37 Interviews with key local women's rights organisations and lawyers working in criminal law reveal some serious challenges to the full implementation and enforcement of Fiji's rape laws. These fell into four broad categories:
- sexist attitudes towards women, including strong belief in rape myths;
 - training needs of justice (including law enforcement) actors, especially the police, on Fiji's laws, including on rape, as well as in gender sensitisation in general;
 - insufficient resources to fully implement and enforce the law leading, for example, to lengthy delays in cases coming to court; and
 - lack of awareness of the law (legal literacy) and rights.

- 11.38 None of these challenges are unique to Fiji. They can be found in most, if not all, countries to some extent. For example, most of the interviewees pointed out that ‘Fiji is a patriarchal society’, and that sexist attitudes towards women and myths about rape are commonly held, including by some police officers, magistrates and judges, who are typically, but not always, male. They reported that these attitudes prevent or limit the proper implementation of the rape law, citing as an example the belief that a husband cannot rape his wife because she is his property. This attitude may be evident in the reports some interviewees relayed of women being turned away by police when trying to report rape by their husband or intimate partner. However, there does not seem to be data available on the number of women affected in this way.¹⁷²
- 11.39 Interviewees also reported that it is not uncommon for some police officers to refuse to believe reports of rape and to threaten to, or actually, charge the victim/survivor with giving false information to a public official under the Crimes Decree, section 201.¹⁷³ This offence is punishable with a maximum of five years’ imprisonment.
- 11.40 Concern was expressed about the level of knowledge of Fiji’s rape law within the Fiji Police Force. One interviewee said lack of understanding of the elements of the crime of rape under the Crimes Decree had led to cases failing at court. The interviewee said this has happened even when the accused pleaded guilty.
- 11.41 It is clear from the interviews that, although the Fiji Police Force has made a lot of improvements, there is still more to do to ensure that investigators, prosecutors and other officers know the law they are to enforce. Interviewees from the legal profession and civil society also felt that the police require more frequent and in-depth training in gender sensitisation so that they respond appropriately, and apply the law and police standards when receiving and investigating reports of rape.

In many ways, the attitudes of judicial officers and law enforcement officers matter more than the legislation itself. Non-sexist legislation will remove the most obvious forms of discrimination, but it cannot make people want to put non-sexist laws into practice. Even good laws are meaningless if they’re not enforced by the courts, judges, magistrates and police [...]

Fiji Women’s Rights Movement¹⁷⁴

- 11.42 Interviewees in the formal justice sector also said many women are not aware of their rights under Fijian law, including that they can report rape and sexual assault to the police.
- 11.43 The checklist that follows assesses Fiji’s rape law against the criteria for good practice.

FIGURE 16: Checklist for Fiji's rape/sexual assault laws

Checklist for Fiji's rape/sexual assault laws <i>These criteria are the same as those listed for rape/sexual assault laws in Part A of this report</i> ● Yes ● Partly ● No ● Unknown	
1. Equality and non-discrimination	
a. Gender-neutral: The crime should be gender-neutral. Any person, regardless of sex or gender, sexual orientation or gender identity, or any other characteristic, can be raped. The definition should not exclude any potential victim/survivor.	●
b. No exception for rape/sexual assault in marriage: The law should clearly state that there is no exception for rape/sexual assault in civil, customary or religious marriages, or marriage-like relationships. ¹⁷⁵ Comment: The Crimes Act does <i>not</i> make an exception for marital rape. The Court of Appeal in 2016 confirmed that rape in marriage is not an exception under Fijian law: <i>Ismail v State</i> . ¹⁷⁶ <i>The Crimes Act should be amended to expressly deal with rape in marriage.</i>	●
c. No time limits: Prosecutions for rape should not be statute barred, regardless of the length of time between the alleged offence and charging.	●
2. Definition of the crimes should not exclude any relevant conduct	
a. Penetration by body parts and objects: Any offence criminalising 'rape' should capture all types of non-consensual penetration: i.e. of mouth, anus or genitalia by a penis and of anus or genitalia by any other body part or object. 'Rape' should not be limited to penetration of a vagina by a penis.	●
b. Penetration, however slight: The definition should specify that penetration, however slight, or to any degree, is sufficient for the crime to be made out.	●
c. Other forms of sexual assault: The law should make clear that all non-consensual sexual conduct constitutes sexual assault.	●
d. Sexual offences against children: Separate contact sexual offences against children should include all sexual contact with children under the age of consent, subject to close-in-age exceptions.' Leave the existing comment as is. Comment: The Crimes Act defines 'defilement' as 'carnal knowledge' of a child. This term should be replaced with neutral language that clearly describes the prohibited conduct.	●

Checklist for Fiji's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

3. Dignity and respect

- a. A crime of power and violence, not morality:** Crimes of rape/sexual assault should be categorised as crimes of power and violence against the physical and mental integrity, and sexual autonomy of the victim/survivor, and not as offences against morality, modesty or honour.

●

Comment: The Crimes Act defines rape to include 'carnal knowledge'. This term should be replaced with neutral language that clearly describes the prohibited conduct.

- b. Respectful language:** The definition of the crimes and defences available, and laws dealing with sentencing, should use language that is respectful, does not perpetuate negative stereotypes and is not moralistic or derogatory. For example, it should not:

●

- **devalue or disparage** people with disability, with terms such as 'imbecile' or 'idiot'.

- **perpetuate gender-discriminatory stereotypes or be moralistic:** For example, 'defilement' in relation to rape/sexual assault of children is an archaic term meaning 'to pollute' or 'to sully', and, in the context of sexual offences, refers to sexual assault of minors. It is linked to the cultural and religious importance given to the virginity of unmarried girls in many societies. However, it is a discriminatory term, as it suggests that girls have been 'spoilt' or 'damaged' by the offence.¹⁷⁷ Sexual offences against children should use neutral and precise terminology and be aligned with language and approach taken in good practice rape/sexual assault provisions.

●

Comment: While most rape/sexual assault provisions meet this criterion, the Crimes Act includes crimes of 'defilement' of children. These provisions should be updated to use neutral, plain language that describes the prohibited conduct—a violent assault.

4. Rape/sexual assault is non-consensual

- a. Non-consensual:** Rape/sexual assault should be defined as non-consensual sexual intercourse (or similar terminology).

●

- b. Definition of consent:** Consent should be defined to mean the unequivocal, free and continuing agreement to the sexual conduct.

●

- c. Submission is not consent:** The law should make clear that passivity or submission by the victim/survivor does not equal consent.

●

Checklist for Fiji's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

d. Physical resistance not necessary: The law should expressly state that lack of evidence of physical resistance or lack of evidence of physical injury to the victim/survivor is not, by reason only of that fact, to be regarded as consenting to the act.



e. Consent cannot be given: The law should give an inclusive list of circumstances in which consent cannot be given. For example, circumstances where:

- the person submits because of force, threat, or fear of harm of any type, to themselves or another;
- the person submits because they are unlawfully detained;
- the person is asleep or unconscious, for example due to alcohol or drugs, so is incapable of freely agreeing;
- the person is incapable of understanding the nature of the act;
- the person is mistaken about the nature of the act, e.g., that it is for medical purposes or spiritual wellbeing;
- the person is mistaken about the identity of the other person;
- the person submits out of respect or fear due to another person's position of authority, trust or responsibility;
- the person submits because of threats to shame, degrade or humiliate them or another;
- the person is under the coercive control of the other person;
- the person is a child;
- the person withdraws consent during the act after initially consenting to it.



Comment: *Although Fiji's rape law includes a number of coercive circumstances in which consent cannot be given, the law could be strengthened by adding situations of 'coercive control', such as in situations of domestic or family violence.*

Checklist for Fiji's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

5. Available defences

- | | |
|---|---|
| <p>a. Honest but mistaken belief in consent or age: The law should limit the common law mistake of fact defences of honest but mistaken belief in consent and honest but mistaken belief in age (where the victim is under the age of consent) to situations where the accused can point to evidence indicating that they took reasonable steps to ascertain consent or age, as the case may be.</p> | ● |
| <p>b. No defence of provocation: The law should <u>not allow</u> defences to rape of provocation (e.g., adultery or suspected adultery), honour, punishment, or passion.</p> | ● |

6. Rules of evidence and procedure

- a. Rules of evidence** in criminal proceedings for rape should make clear that:

- | | |
|---|---|
| <p>▪ No corroboration: Corroboration by a third party of the victim/survivor's testimony is not required;</p> | ● |
| <p>▪ Equality of arms: The prosecution and defence are equal in the evidence they can lead and the weight given to that evidence; and</p> | ● |
| <p>▪ Prior sexual behaviour/Rape Shield Law: Evidence of a complainant's prior sexual conduct with the accused or another person is presumptively inadmissible and only allowed with the prior leave of the court and never to infer that, because of the sexual nature of that conduct, the victim is more likely to have consented to the sexual activity at issue or is less worthy of belief in respect of their assertion that they did not consent to the sexual activity at issue. Such evidence can only be adduced for legitimate purposes, such as to establish that a complainant made an inconsistent statement.</p> | ● |

- b. Rules of procedure:** The rules of procedure should give a judge or magistrate hearing a charge of rape a general power to order measures to protect the safety and wellbeing of the victim/survivor, including, for example, to close the court to the public, or to make orders allowing the following in relation to the victim/survivor:

- | | |
|--|---|
| <p>▪ Testimony by video: Give testimony by video link;</p> | ● |
| <p>▪ Shielded from accused: Be shielded from the defendant in court, e.g., by a curtain;</p> | ● |
| <p>▪ Accompanied by a friend: Be accompanied by a friend or carer for support in the witness box; and</p> | ● |
| <p>▪ Identity: Choose whether to have their identity concealed.</p> | ● |

Checklist for Fiji's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

7. Appropriate penalties

Reflect gravity of the crime: Penalties for rape should reflect the gravity of the crime, and exclude the death penalty and corporal punishment as contrary to international human rights law.



8. Mediation and settlement are not replacements for criminal prosecution

Express prohibition: The law should prohibit the following:

a. Mandatory mediation, conciliation or reconciliation between the victim/survivor and the perpetrator.

Comment: *Fijian law does not mandate mediation and is silent on the Fijian customary practices of apology or atonement for harm caused, including for rape, known as 'bulubulu' or 'soro'. These practices may not be contrary to good practice law if they are not mandatory, are not used to avoid criminal investigation and prosecution, and the victim/survivor is not coerced into participating. Some interviewees said that bulubulu is often considered as a mitigating factor in sentencing of convicted persons. However, the extent to which it is practised in Fiji was not part of this research.*



b. Monetary settlement in place of criminal prosecution; and

Comment: *Fijian law is silent.*



c. Marriage between the perpetrator and the victim/survivor in place of criminal prosecution.

Comment: *Fijian law is silent.*



9. Implementation and monitoring

a. An independent monitoring process: To ensure the law is effective, it should establish an independent, expert monitoring process, such as a multi-agency body with authority to monitor the implementation of the law and make recommendations to government;



b. Collect disaggregated data: The law should require all justice sector actors (courts, police prosecutors, and public solicitors such as legal aid) to collect data, for example on the number of rape complaints, rape investigations completed, rape charges laid, convictions, acquittals, and related data. All data should be disaggregated by sex, sexual orientation, gender identity, age, disability status, and by other factors as relevant to the local circumstances.



Comment: *Data collection not mandated in criminal law, however justice sector agencies do collect this kind of data.*

Checklist for Fiji's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

- c. Publish data and information for transparency and accountability:** Some information from data collected should be published and made available to the public, including data from the justice sector agencies, as well as court decisions, which should be anonymised.

Comment: For example, the Fiji Office of the Director of Public Prosecutions now publishes the total number of serious sexual violence cases being prosecuted each month. This information is sex-disaggregated. Fiji courts publish some decisions on serious sexual offences on PacLii.



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- 147 In Fiji, 'rape' is the term used for the sexual offence of non-consensual penetration of a sexual nature.
- 148 These Acts were originally issued as government decrees in 2009. In 2016, they were constitutionalised by an Act of Parliament and obtained the status of an Act. Enacted as the *Crimes Decree 2009* and the *Criminal Procedure Decree 2009*. Section 107(b)(i) of the Revised Edition of the Laws (*Consequential Amendments*) Act 2016 (Act No. 31 of 2016) provided that reference made to any 'Decree' will now be replaced with the word 'Act'. As a result, the *Crimes Act 2009* and the *Criminal Procedure Act 2009* are the correct citations.
- 149 *Penal Code* (Fiji) s 149, later repealed by the *Crimes Decree 2009*.
- 150 *Crimes Act 2009* (Fiji) s 206(1).
- 151 *State v Vakadranu* [2016] FJHC 899 [9] <<http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJHC/2016/899.html?stem=&synonyms=&query=Vakadranu>> (last accessed March 2019).
- 152 *Ibid* [9].
- 153 *Ibid* [20].
- 154 *Ibid* [28].
- 155 *Ibid* [29]–[33].
- 156 *Family Law Act 1975* (Australia) s 4AB(2) gives examples of what constitutes family violence by coercive control.
- 157 UN Women, *Facts and figures: Ending violence against women* (2018) <<http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>> (last accessed March 2019).
- 158 *Ismail v State* [2016] FJCA 136; AAU0113.2014 (20 September 2016) <<http://www.paclii.org/fj/cases/FJCA/2016/136.html>> (last accessed March 2019).
- 159 *Ibid* [4].
- 160 *Ibid*.
- 161 *Aitcheson v the State* [2018] FJSC 29 (2 November 2018) <<http://www.paclii.org/fj/cases/FJSC/2018/29.html>> (last accessed March 2019).
- 162 *Ibid* [24].
- 163 *State v Vukici* [2018] FJHC 1193 (14 December 2018) <<http://www.paclii.org/fj/cases/FJHC/2018/1193.html>> (last accessed March 2019).
- 164 *Balelala v State* [2004] FJCA 49 (11 November 2004) <<http://www.paclii.org/fj/cases/FJCA/2004/49.html>> (last accessed March 2019).
- 165 Jalal, above n47.
- 166 *Ibid* 35–36.
- 167 Other relevant legislation includes: the *Sentencing & Penalties Act 2009*, which establishes sentencing guidelines or tariffs previously determined through common law; the *Child Welfare Act 2010*, which requires mandatory reporting of cases of child abuse by health professionals, welfare officers, police and lawyers; the *Domestic Violence Act 2010*; and the *Constitution* (2013), which guarantees the right to equality and freedom from discrimination on grounds that include 'sex, gender, sexual orientation, gender identity and expression', and the right to security of the person, including the right to be free from any form of violence from any source, at home, school, work, or in any other place.
- 168 *Ismail*, above n158.
- 169 *Ibid*.
- 170 Interview with retired judge from Fiji (by telephone, 28 February 2019) on file with authors.
- 171 Interview with representative of a Fiji Women's NGO (by phone, 22 February 2019) on file with authors.

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- 172 However, there are recent data on women being turned away when they report domestic violence, which may include rape and sexual assault, to the police. In a survey of women conducted in 2017, 60% of the 49 women surveyed said the police told them to resolve the issue within the family or village, or the police did not take them seriously. UN Women, *Balancing the Scales, Improving Fijian Women's Access to Justice*, 2017, [75–78] <http://www.fwrn.org.fj/images/fwrn2017/publications/analysis/Balancing-the-Scales-Report_FINAL-Digital.pdf> (last accessed March 2019).
- 173 Interview with Women's NGO (by telephone, 11 February 2019) on file with authors.
- 174 Jalal, above n38.
- 175 Exemptions or immunity for rape in marriage are inconsistent with international law under both the ICCPR and CEDAW.
- 176 *Ismail*, above n158.
- 177 Forster & Jivan, above n67.

The Pacific: Solomon Islands[‡]

Solomon Islands' legislative framework on rape/sexual assault

- 11.44 The Solomon Islands' laws on rape are found in the *Penal Code* as amended by the *Penal Code (Amendment) (Sexual Offences) Act 2016*, and the *Evidence Act 2009*.
- 11.45 In addition, the *Family Protection Act 2014* makes 'domestic violence' a criminal offence. 'Domestic violence' is defined as including sexual abuse and sexual assault. Under the *Family Protection Act*, the police are required to investigate if they witness or hear about any act of domestic violence, including sexual assaults, and to take specific measures to refer survivors to appropriate support services, including emergency accommodation.

THE PENAL CODE

- 11.46 The *Penal Code (Amendment) (Sexual Offences) Act 2016* repealed and replaced the outdated and discriminatory sexual assault offences in the Penal Code. For example, before the reforms were made:
- rape and other sexual assaults could only be committed by males against females;
 - sexual offences against children were limited to girls, and were classed as 'defilement' offences rather than rape or sexual assault. As discussed above in the Fiji country study, 'defilement' is an archaic term which means 'to pollute' or 'to sully', and, in the context of sexual assault of children, is linked to protection of the virginity of girls; and
 - the offence of defilement of a girl between 13 and 15 years of age was punishable as a misdemeanour with a maximum penalty of five years imprisonment, compared to the felony of rape with a maximum penalty of life imprisonment;
 - referred to women and girls with cognitive disability as 'idiots' and 'imbeciles'; and
 - prosecutions for defilement of a girl between 13 and 15 years of age were statute barred after 12 months.
- 11.47 The rape/sexual assault reforms brought the *Penal Code* up to date and into compliance with the Solomon Islands' obligations under international human rights law, including under the following treaties to which it is a party: the ICESCR, CEDAW, and CRC. It has signed but not ratified the CRPD. A summary of current law follows.
- 11.48 Section 136F of the *Penal Code* creates and defines the offence of rape and sets the maximum penalty as life imprisonment:

[‡] This is a summary only. It is not a comprehensive description or analysis of Solomon Islands' laws.

(1) A person commits an offence if the person has sexual intercourse with another person:

(a) without the other person's consent; and

(b) knowing about or being reckless as to the lack of consent.¹⁷⁸

11.49 Section 136F also specifies that marriage is not a defence to rape:

(3) To avoid doubt, subsection (1) applies even if the persons are married or in a marriage-like relationship.

11.50 It is clear that lack of physical resistance to the rape is not consent:

A person who does not offer actual physical resistance to an act is not, by reason only of that fact, to be regarded as consenting to the act.¹⁷⁹

11.51 The crime is gender-neutral and is defined broadly. 'Sexual intercourse', the underlying act in the crime of rape, covers penetration 'to any extent', by any body part or object, of the genitalia (including surgically constructed or altered genitalia) or anus, by a penis or a mouth, as well as oral sex (fellatio and cunnilingus) (section 136D).

Consent

11.52 'Consent' in the Solomon Islands *Penal Code* means 'free and voluntary agreement'. Section 136A of the Code lists a wide range of circumstances when a person can never consent, including that:

- the person submits because of force, threat, or fear of harm of any type, to himself or herself or another person;
- the person submits because he or she is unlawfully detained;
- the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
- the person is incapable of understanding the nature of the act;
- the person is mistaken about the nature of the act or the identity of the other person;
- the person mistakenly believes that the act is for medical or hygienic purposes;
- the person mistakenly believes that the act will be beneficial to his or her physical, psychological, social or spiritual wellbeing;
- the person submits out of respect or fear due to another person's position of authority, trust or responsibility;
- the person submits because of threats to shame, degrade or humiliate the person or another person;
- the person submits because of a false representation as to the nature or purpose of the act; or
- the person withdraws consent during the act after initially consenting to it.

FIGURE 17: Meaning of ‘person in position of trust’ in the Solomon Islands Penal Code

Meaning of ‘person in a position of trust’

Section 136C of the *Penal Code* defines a person as a ‘person in a position of trust’ in relation to a child if the person holds a position of trust or authority in relation to the child, or if the child is dependent in any way on the person. The section contains a list of some of these people. There may be others as well.

The section says that a person is in a position of trust in relation to a child if the person is:

- a family member, including the child’s parent, grandparent, step-parent or adoptive parent, sibling, half-sibling or step-sibling, uncle or aunt or cousin;
- the child’s custodian, guardian or carer;
- the child’s custom doctor or healer, or medical practitioner;
- the child’s teacher, counsellor, legal practitioner or employer;
- a leader of the child’s religion or community; or
- a police officer or, if the child is in a correctional centre, a correctional services officer in the centre.

- 11.53 The crime of rape is non-consensual penetration of a sexual nature, as defined in section 136F. If no coercive circumstances were present at the time of the alleged incident, then it will be rape if there is no consent and the accused person knew there was no consent or was ‘reckless’ as to the lack of consent. Section 136E explains what ‘recklessness’ in relation to consent means:

For this Part, a person is reckless as to another person’s lack of consent if:

(a) the person is aware of a risk that the other person does not consent and it is unreasonable to take the risk; or

(b) the person does not give any thought as to whether the person is consenting.

Other sexual offences in the Penal Code

- 11.54 The updated *Penal Code* also contains the following sexual offences:

- **Compelled sexual intercourse:** A person compels a person to engage in sexual intercourse with another person without consent, and knowing or being reckless as to the lack of consent (section 136G).
- **Indecent act without consent:** An indecent act is an act of a sexual nature, other than sexual intercourse, e.g., touching in a sexual way, ‘which a reasonable person would consider to be contrary to community standards of decency’ (sections 138 and 136B). The defence of marriage to a charge of indecent act without consent is expressly excluded.

→ **Rape or indecent act – person with significant disability:**

A person has sexual intercourse with, or commits an indecent act with, or in the presence of a person with a significant disability, knowing that they have that disability, and knowing that the person submits to the activity because of their disability (section 138A). The defence of marriage to this offence is expressly excluded.

‘Significant disability’ means an intellectual, mental or physical condition or impairment (or a combination of more than one of these types of condition or impairment) that affects a person to such an extent that it significantly impairs their capacity to:

(a) understand the nature of sexual conduct; or

(b) understand the nature of a decision about sexual conduct; or

(c) communicate decisions about sexual conduct.

Penal Code (as amended by the Penal Code (Amendment) (Sexual Offences) Act 2016 (Solomon Islands) s 138A(1)

→ **Abduction or detention** with intent of having sexual intercourse with the person, or committing an indecent act on or in the presence of the person (section 137).

Sexual offences against children

11.55 The *Penal Code (Amendment) (Sexual Offences) Act* replaced the old ‘defilement’ offence and reframed it as sexual intercourse with a child under the age of 15 years (section 139). It uses the same definition of sexual intercourse as for rape and is now gender-neutral. Other specific sexual offences against children are:

- sexual intercourse or indecent act – child under 18 (section 140);
- procuration (section 141);
- persistent sexual abuse of child (section 142);
- child commercial sexual exploitation (section 143); and
- incest (section 163).

11.56 All the other general sexual offences, with the exception of rape (section 136F), prescribe higher penalties for offences against children.¹⁸⁰

EVIDENCE ACT 2009

Discriminatory rules

11.57 The *Evidence Act 2009* abolished some of the discriminatory rules of evidence imported from the English common law:

- section 7 abolishes the 'corroboration rule';
- section 58 excludes evidence or direct or indirect questioning of a complainant's previous sexual experience, and evidence or questioning of the complainant's sexual reputation is not allowed if it is:
 - (a) for the purpose of supporting or challenging the truthfulness of the complainant;
 - (b) for the purpose of establishing the complainant's consent; or
 - (c) for any other purpose except with the permission of the court.¹⁸¹

Protection for vulnerable witnesses

- 11.58 It also contains several provisions to respect the dignity and wellbeing of a witness who may be a victim/survivor of rape/sexual assault or may be vulnerable for another reason. Section 41 authorises a court to make special procedural arrangements for 'vulnerable witnesses' if:

it considers that the capacity of a witness to give evidence satisfactorily may be limited and that limitation may be lessened by making special arrangements for the taking of that person's evidence.¹⁸²

- 11.59 The Act does not define 'vulnerable witness', who could be any witness, however it does give examples, which include victims/survivors of sexual violence ('crimes against morality') or domestic violence, children (under 18 years), or people with disability.
- 11.60 Section 41 lists the factors the court must consider when deciding what, if any, special procedural arrangements to make for a vulnerable witness, including:
- the desirability of minimising distress or trauma for the witness;
 - the need to ensure the witness is treated with dignity, respect and compassion;
 - the possibility of the witness being intimidated when giving evidence; and
 - the need to resolve the proceeding as quickly as possible.
- 11.61 The Act provides for a wide range of possible special procedural measures,¹⁸³ including closing the court, testifying by video-link,¹⁸⁴ obscuring the witness from the view of the accused, or allowing a support person to accompany the witness.
- 11.62 A court also has the power to intervene if a witness's ability to testify under cross-examination may be adversely affected if it is the accused who conducts the cross-examination. In that circumstance, the court may appoint a person to ask the witness any questions the accused wants asked (section 42).
- 11.63 There is a general rule in section 66 of the *Evidence Act*, applicable in any proceedings, that permits court to disallow improper questions of a witness. A question may be improper if it is:
- (a) misleading or confusing;
 - (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive,
 - (c) asked in a tone or manner that is belittling, insulting or otherwise inappropriate; or
 - (d) without basis, other than a sexist, racist, cultural or ethnic stereotype.¹⁸⁵

- 11.64 This is a potentially important rule that a court can use to protect a witness in a rape/sexual assault case from being subjected to questions from the defence that are aimed at undermining her credibility by, for example harassing her or blaming her for the assault on the basis of gender discriminatory stereotypes.

Assistance for witnesses with disability

- 11.65 A court can order communication assistance to enable a witness to give evidence if required.¹⁸⁶ It may also allow a witness who is deaf or hard of hearing, or who has difficulty speaking, to be questioned in an appropriate way, including through an interpreter (sections 69–70).

FIGURE 18: Summary of Solomon Islands’ rape/sexual assault laws

Summary of Solomon Islands’ legislative framework on rape/sexual assault	
<i>Penal Code, as amended by the Penal Code (Amendment) (Sexual Offences) Act 2016</i>	<ul style="list-style-type: none"> ▪ Creates the following sexual offences, all of which are gender-neutral and non-consensual: <ul style="list-style-type: none"> o ‘rape’, ‘indecent act’, ‘compelled sexual intercourse’, and ‘rape or indecent act – person with significant disability’ o sexual offences specifically against children— ‘sexual intercourse or indecent act against child under 15 or child under 18’, ‘procuration’, ‘persistent sexual abuse of child’, ‘child commercial sexual exploitation’ and ‘incest’ ▪ Excludes marriage as a defence to any sexual offence ▪ Defines consent as free and voluntary agreement
<i>Family Protection Act 2014</i>	<ul style="list-style-type: none"> ▪ Creates the offence of ‘domestic violence’ ▪ Defines ‘domestic violence’ as including sexual abuse and sexual assault ▪ Requires the police to investigate any act of domestic violence, including rape/sexual assault, that they witness or hear about ▪ Requires the police to take specific measures to refer victims/survivors of domestic violence, including rape/sexual assault, to appropriate support services, including emergency accommodation ▪ Establishes a protection regime against domestic violence

Summary of Solomon Islands' legislative framework on rape/sexual assault

<i>Evidence Act 2009</i>	<ul style="list-style-type: none">▪ Abolishes the 'corroboration rule'▪ Excludes evidence of a complainant's prior sexual activity and reputation▪ Allows a court to take a range of measures or make orders to protect a witness, including:<ul style="list-style-type: none">○ ordering special procedural measures for vulnerable witnesses and people with disability○ disallowing an improper question○ intervening if a witness's ability to testify under cross-examination may be adversely affected if the accused conducts the cross-examination
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Reform process

High prevalence of violence against women and girls

- 11.66 In 2009, the Solomon Islands conducted its first Family Health and Safety Study to map the extent and nature of physical, sexual and emotional violence against women and children, with a focus on violence by intimate partners. The findings of the study were alarming. They included:
- 64% of women aged 15–49 who had ever had an intimate partner had experienced some kind of violence by the partner, and it was more likely to be severe than moderate or mild;
 - in all, 18% of women had experienced non-partner violence;
 - 37% had been sexually abused before the age of 15; and
 - survivors of violence were more likely to report poorer health outcomes and nearly four times more likely than others to have attempted suicide.¹⁸⁷
- 11.67 Also alarming was the finding that violence against women and girls was perceived as normal: 73% of men and 73% of women said they believed violence against women is justifiable, especially for infidelity and disobedience, as when women do 'not live up to the gender roles that society imposes'.¹⁸⁸
- 11.68 The study also confirmed the traditional practice of 'bride price' as a significant risk factor for violence against women and girls, including sexual violence, where it is commonly considered similar to acquiring a property title, giving men ownership over women. Women reported that they felt that bride prices prevented them from leaving violent partners for many reasons, including that:
- they did not have enough money to pay the compensation that would be required if they left.¹⁸⁹

Law Reform Commission review of the Penal Code

11.69 In 2008, the Solomon Islands Law Reform Commission commenced a review of the *Penal Code* and *Criminal Procedure Code*, much of which had not been updated since the colonial era.¹⁹⁰ It was given the tasks of:

making recommendations to address developments in new crimes and [to] make the Penal Code more responsive to the modern needs of the Solomon Islands [...] [and to] modernise and simplify the law, eliminate defects in the law, introduce new and more effective methods for the administration of justice.¹⁹¹

11.70 The Law Reform Commission began this work by publishing an issues paper, *Review of Penal Code and Criminal Procedure Code Issues Paper 1* (the **Issues Paper**), in which it analysed all existing offences under the Code, including all the sexual offences.¹⁹² The *Issues Paper* formed the basis of nationwide consultations.

11.71 The review is proceeding in stages, but the sexual offences provisions were examined reasonably early in the inquiry process because they were identified as being terribly out of date and inconsistent with CEDAW.¹⁹³

11.72 In 2013, the Commission published its *Second Interim Report*, which focused on the sexual offences provisions.¹⁹⁴ The Commission considered the findings of the Family Health and Safety Study, as well as examples of best practice rape/sexual assault laws from around the world. It then conducted a further round of public consultations before finalising its recommendations.

11.73 In formulating its recommendations, the Commission reported that it was guided by the underlying principles of the need for reform:

- to eliminate gender bias and discrimination;
- to strengthen the laws in relation to violence against women; and
- to strengthen the protection of children from all forms of sexual abuse and exploitation.

11.74 This would bring the *Penal Code* into line with Solomon Islands' policies, and its obligations under CEDAW and the CRC.¹⁹⁵ The Government adopted most of the recommendations in the *Penal Code (Amendment) (Sexual Offences) Act 2016* after a further public consultation process on the draft law.

Implementation of the law

*It's not just having the law in place, it's [victims/survivors] having reasonable access to justice.*¹⁹⁶

- 11.75 The changes to Solomon Islands rape/sexual assault laws in 2016 were significant. In many ways, it is too early to properly assess the implementation of those reforms. Since the law was changed, there have been government, NGO and UN agency (especially UNICEF) efforts to ensure that the law is implemented, including training of different parts of the justice (including law enforcement) sector, public awareness campaigns, and collaborating with community leaders. For example, we were informed that in one province a new ‘zero tolerance’ policy for sexual abuse has been set up by chiefs from across the province in collaboration with the police. However, a number of challenges to the proper implementation of the reforms have been identified. It remains to be seen whether these can be overcome in the coming years.
- 11.76 Many of these challenges to implementation are also found in other countries in the region, including:
- lack of financial resources in the justice sector, including the police force;
 - a population that is scattered across multiple islands, with many people living in isolated and remote communities with little or no access to the police, the courts, or health or other services;
 - low levels of income, making it difficult for people to make the multiple trips to police or the courts necessary to pursue a complaint of rape/sexual assault;
 - significant disincentive for women to report rape/sexual assault by their husband or other male relative on whom they are totally financially dependent; and
 - poor access to justice for many victims/survivors, including people with disability.¹⁹⁷

*Other countries may want to copy [our rape/sexual assault law], but they should first know about the challenges confronting us.*¹⁹⁸

- 11.77 Some Solomon Islands communities emphasise resolving disputes within the community through traditional customary practices rather than in the formal justice system, including for rape/sexual assault. It was explained that typically the accused person will make a payment to the male family members of the victim/survivor. It is not uncommon for a rape/sexual assault complaint to be withdrawn or never made in these cases. If there is a trial and conviction, it is common for the judge to consider the payment of any customary penalty as a mitigating factor in sentencing, on the basis that it demonstrates an admission of guilt and some remorse by the perpetrator. However, the victim/survivor often does not receive any compensation, which typically goes to her family.

*The victims never get any of the money [in a customary settlement]. It all goes to the men—fathers and uncles—as payment for damage to their ‘property’.*¹⁹⁹

- 11.78 Other challenges raised included a lack of gender sensitivity and understanding about the reformed laws amongst members of the judiciary. For example, some judgments are very brief, and give few reasons for the decision, making it difficult to see if the courts are applying the law as intended by the legislation.
- 11.79 Other challenges to implementation are similar to those faced by many if not all countries in the world to some extent, including:
- discriminatory attitudes towards women;
 - pervasive misconceptions about sexual offences;
 - enduring rape/sexual assault myths; and
 - low levels of legal literacy among the general population about rights and laws.

FIGURE 19: Checklist for Solomon Islands' rape/sexual assault laws

Checklist for Solomon Islands' rape/sexual assault laws <i>These criteria are the same as those listed for rape/sexual assault laws in Part A of this report</i> ● Yes ● Partly ● No ● Unknown	
1. Equality and non-discrimination	
a. Gender-neutral: The crimes should be gender-neutral. Any person, regardless of sex or gender, sexual orientation or gender identity or any other characteristic can be raped. The definition should not exclude any potential victim/survivor.	●
b. No exception for rape/sexual assault in marriage: The law should clearly state that there is no exception for rape/sexual assault in civil, customary or religious marriages, or marriage-like relationships. ²⁰⁰	●
c. No time limits: Prosecutions for rape should not be statute barred, regardless of the length of time between the alleged offence and charging.	●
2. Definition of the crimes should not exclude any relevant conduct	
a. Penetration by body parts and objects: Any offence criminalising 'rape' should capture all types of non-consensual penetration: i.e. of mouth, anus or genitalia by a penis and of anus or genitalia by any other body part or object. 'Rape' should not be limited to penetration of a vagina by a penis.	●
b. Penetration, however slight: The definition should specify that penetration, however slight, or to any degree, is sufficient for the crime to be made out.	●
c. Other forms of sexual assault: The law should make clear that all non-consensual sexual conduct constitutes sexual assault.	●
d. Sexual offences against children: Separate contact sexual offences against children should include all sexual contact with children under the age of consent, subject to close-in-age exceptions.	●

Checklist for Solomon Islands' rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

3. Dignity and respect

a. A crime of power and violence, not morality: Crimes of rape/sexual assault should be categorised as crimes of power and violence against the physical and mental integrity, and sexual autonomy of the victim/survivor and not as offences against morality, modesty or honour.



b. Respectful language: The definition of the crimes and defences available, and laws dealing with sentencing, should use language that is respectful, does not perpetuate negative stereotypes and is not moralistic or derogatory. For example, it should not:



- **devalue or disparage** people with disability, such as 'imbecile' or 'idiot';



- **perpetuate gender discriminatory stereotypes or be moralistic.** For example, 'defilement', in relation to rape/sexual assault of children, is an archaic term meaning 'to pollute' or 'to sully', and, in the context of sexual offences, refers to sexual assault of minors. It is linked to the cultural and religious importance given to the virginity of unmarried girls in many societies. However, it is a discriminatory term, as it suggests that girls have been 'spoilt' or 'damaged' by the offence. Sexual offences against children should use neutral and precise terminology and be aligned with language and approach taken in good practice rape/sexual assault provisions.



4. Rape/sexual assault is non-consensual

a. Non-consensual: Rape/sexual assault should be defined as 'non-consensual sexual intercourse' (or similar terminology).



b. Definition of consent: Consent should be defined as 'unequivocal, free, voluntary and continuing agreement' to the sexual conduct.



c. Submission is not consent: The law should make clear that passivity or submission by the victim/survivor does not equal consent.

Comment: The Penal Code does not expressly state that mere submission is non-consent. However, the definition of consent as freely and voluntarily given, together with the non-exhaustive list of circumstances in which a person cannot consent, require that active agreement to the sexual activity be given.²⁰¹



Checklist for Solomon Islands' rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

- d. Physical resistance not necessary:** The law should expressly state that lack of evidence of physical resistance or lack of evidence of physical injury to the victim/survivor is not, by reason only of that fact, to be regarded as indicating consent to the act.

Comment: The Penal Code does not expressly state that the accused must take steps to ensure that there is consent. However, the definition of consent as 'freely and voluntarily given', together with the non-exhaustive list of circumstances in which a person cannot consent, requires an accused person to show the basis on which they believed there was consent. This should include what reasonable steps they took for this purpose.²⁰²

- e. Consent cannot be given:** The law should give an inclusive list of circumstances in which consent cannot be given. For example, where:
- the person submits because of force, threat, or fear of harm of any type, to themselves or another;
 - the person submits because they are unlawfully detained;
 - the person is asleep or unconscious, for example due to alcohol or drugs, so is incapable of freely agreeing;
 - the person is incapable of understanding the nature of the act;
 - the person is mistaken about the nature of the act, e.g., that it is for medical purposes or spiritual wellbeing;
 - the person is mistaken about the identity of the other person;
 - the person submits out of respect or fear due to another person's position of authority, trust or responsibility;
 - the person submits because of threats to shame, degrade or humiliate them or another;
 - the person is a child;
 - the person withdraws consent during the act after initially consenting to it.

5. Available defences

- a. Honest but mistaken belief in consent or age:** The law should limit the common law mistake of fact defences of honest but mistaken belief in consent and honest but mistaken belief in age (where the victim is under the age of consent) to situations where the accused can point to evidence indicating that they took reasonable steps to ascertain consent or age, as the case may be.

Checklist for Solomon Islands' rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

- b. No defence of provocation:** The law should not allow defences to rape of provocation (e.g., adultery or suspected adultery), honour, punishment, or passion.



6. Rules of evidence and procedure

- a. Rules of evidence** in criminal proceedings for rape should make clear that:

- **No corroboration:** Corroboration by a third party of the victim/survivor's complaint is not required;



- **Equality of arms:** The prosecution and defence are equal in the evidence they can lead, and the weight given to that evidence; and



- **Prior sexual behaviour/Rape Shield Law:** Evidence of a complainant's prior sexual conduct with the accused or another person is presumptively inadmissible and only allowed with the prior leave of the court and never to infer that, because of the sexual nature of that conduct, the victim is more likely to have consented to the sexual activity at issue or is less worthy of belief in respect of their assertion that they did not consent to the sexual activity at issue. Such evidence can only be adduced for legitimate purposes, such as to establish that a complainant made an inconsistent statement.



- b. Rules of procedure:** The rules of procedure should give a judge or magistrate hearing a charge of rape a general power to order measures to protect the safety and wellbeing of the victim/survivor, including, for example, to close the court to the public or to make orders allowing the following for the victim/survivor:



- **Testimony by video:** Give testimony by video link;



- **Shielded from accused:** Be shielded from the defendant in court, e.g., by a curtain;



- **Accompanied by a friend:** Be accompanied by a friend or carer for support in the witness box; and



- **Identity:** Choose whether to have their identity concealed.



7. Appropriate penalties

- Reflect gravity of the crime:** Penalties for rape/sexual assault should reflect the gravity of the crime, and exclude the death penalty and corporal punishment as contrary to international human rights law.



Checklist for Solomon Islands' rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

8. Mediation and settlement are not replacements for criminal prosecution

Express prohibition: The law should prohibit the following:

- a. Mandatory mediation, conciliation or reconciliation** between the victim/survivor and the perpetrator.

●

Comment: *Not provided for in law.*

- b. Monetary settlement** in place of criminal prosecution; and

Comment: *Not provided for in law, although traditional reconciliation practices of compensating the family of the victim/survivor are practised in the Solomon Islands.*

●

- c. Marriage** between the perpetrator and the victim/survivor in place of criminal prosecution.

●

Comment: *Not provided for in law.*

9. Implementation and monitoring

- a. An independent monitoring process:** To ensure the law is effective, it should establish an independent, expert monitoring process, such as a multi-agency body with authority to monitor the implementation of the law and make recommendations to government;

●

- b. Collect disaggregated data:** The law should require all justice sector actors (courts, police prosecutors and public solicitors such as legal aid) to collect data, for example on the number of rape complaints, rape investigations completed, rape charges laid, convictions, acquittals, and related data. All data should be disaggregated by sex, age, disability status, and by other factors as relevant to the local circumstances.

●

Comment: *Data collection not mandated in criminal law, but justice sector agencies do collect this kind of data.*

- c. Publish data and information for transparency and accountability:** Some information from data collected should be published and made available to the public, including data from the justice sector agencies, as well as anonymised court decisions.

●

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- 178 *Penal Code* (Solomon Islands) s 136F (emphasis added).
- 179 *Ibid* s 136A(3).
- 180 For a detailed discussion of these offences, see Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code, Second Interim Report Sexual Offences* (2013) Chapters 7–12 <<http://www.paclii.org/sb/lawreform/SBLawRComm/2013/1.pdf>> (last accessed March 2019).
- 181 *Evidence Act 2009* (Solomon Islands) s 58.
- 182 *Ibid* s 41.
- 183 *Ibid*,
- 184 See also, *ibid* s 52.
- 185 *Ibid* s 66.
- 186 *Ibid* s 69.
- 187 Secretariat of the Pacific Community, *Solomon Islands Family Health and Safety Study: A study on violence against women and children, 2009* <<https://pacificwomen.org/resources/solomon-islands-family-health-and-safety-study/>> (last accessed March 2019).
- 188 *Ibid*, for example, 11.
- 189 *Ibid* 127, 133–34 & 143.
- 190 For a summary of the Inquiry and the Terms of Reference, see, Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code, First Interim Report* (2011) <<http://www.lawreform.gov.sb/our-work/current-references/penal-code-and-criminal-procedure-code.html>> (last accessed March 2019).
- 191 Solomon Islands Law Reform Commission, above n180, 33.
- 192 Solomon Islands Law Reform Commission, *Review of Penal Code and Criminal Procedure Code Issues Paper 1* (2008) <<http://www.lawreform.gov.sb/publications/other-reports/consultation-papers/7-issues-paper-on-penal-code-review/file.html>> (last accessed March 2019).
- 193 Ministry of Justice and Legal Affairs officer, interview conducted by phone, 25 March 2019, on file with the authors.
- 194 Solomon Islands Law Reform Commission, above n180. See also, the related but separate report on sentencing in sexual offences published 2011, Solomon Islands Law Reform Commission, *Review of the Penal Code And Criminal Procedure Code: Sexual Offences - Sentencing Research Paper* (2011) <<http://www.lawreform.gov.sb/publications/other-reports/consultation-papers/9-sexual-offences-sentencing-research-report/file.html>> (last accessed March 2019).
- 195 Solomon Islands Law Reform Commission, above n180.
- 196 Interview with Solomon Islands Office of the Director of Public Prosecutions by phone, 29 March 2019, on file with the authors.
- 197 Ministry of Justice and Legal Affairs officer, interview conducted 25 March 2019; Solomon Islands Law Reform Commission, above n194, [6.33]–[6.38].
- 198 *Ibid*.
- 199 *Ibid*
- 200 Exemptions or immunity for rape in marriage are inconsistent with international law under both the ICCPR and CEDAW.
- 201 Ministry of Justice and Legal Affairs officer, interview conducted 25 March 2019.
- 202 *Ibid*.

Africa: Namibia[‡]

Namibia's legislative framework on rape/sexual assault

- 11.80 Namibia's laws on rape are found in the *Combating of Rape Act 2000*. The reforms in that Act were supplemented by amendments to the *Criminal Procedure Act 1977*, made by the *Criminal Procedure Amendment Act 2003*. Some sexual offences are also found in the *Combating of Immoral Practices Act 1980*, including unlawful sexual acts against children under 16 years of age by another person who is more than three years older and who is not married to them, and 'unlawful carnal intercourse with any female idiot or imbecile' in circumstances that do not amount to rape.²⁰³

COMBATING OF RAPE ACT 2000

*The Combating of Rape Act 2000 is one of the most progressive laws on rape in the world. Implicit in the Act is a recognition that rape is not a sexual crime, but that it is a crime of violence and power which uses sex as a weapon to humiliate and destroy.*²⁰⁴

- 11.81 The *Combating of Rape Act* made significant changes to Namibia's rape law, replacing a discriminatory law with one that is consistent with Namibia's constitutional guarantees of equality and non-discrimination (Article 10, *Namibian Constitution*) and its international human rights obligations under the following treaties: the ICCPR, ICESCR, CEDAW, CRC, and CRPD.

Definition of the crime

- 11.82 Section 2 creates and defines the offence of rape:
- 2 (1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances –
 - (a) commits or continues to commit a sexual act with another person;
or
 - (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape.
- 11.83 Section 1 gives a broad definition of 'sexual act'. It includes 'the insertion to even the slightest degree', of a penis into a vagina, anus or mouth, of an object or part of an animal into a vagina or anus, and 'cunnilingus or any other form of genital stimulation.'

[‡] This is a summary only. It is not a comprehensive description or analysis of Namibia's laws.

- 11.84 'Coercive circumstances' are defined 'to include, but are not limited to':
- the use of physical force or threats of force or other harm against the complainant or another person;
 - the complainant is under the age of 14 years and the perpetrator is more than three years older than the complainant;
 - the complainant is unlawfully detained;
 - the complainant is affected by:
 - o physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary); or
 - o intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or
 - o sleep, to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act, or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;
 - the perpetrator or another person fraudulently deceives the complainant about the nature of the act or the identity of the perpetrator; or
 - the presence of more than one person is used to intimidate the complainant (section 2(2)).
- 11.85 This definition is a significant departure from the previous rape law because it:
- defines rape in gender-neutral terms to reflect that men and boys can be raped;
 - defines rape broadly to cover a range of 'sexual acts' beyond penetration of a vagina with a penis to also include anal intercourse, oral contact with the genitals, and penetration of genitals or anus with an object; and
 - shifts the emphasis from a victim/survivor's 'absence of consent' to the actions of the perpetrator, and especially their use of force or coercion.
- 11.86 Neither non-consent, other than in the context of coercive circumstances, or withdrawal of consent after sexual activity has commenced are expressly covered in the Act.
- 11.87 One of the most important and controversial changes²⁰⁵ the Act made was to remove the marital rape exception. It is clear now that a husband cannot rely on marriage as a defence to a charge of rape.

No marriage or other relationship shall constitute a defence to a charge of rape under this Act

Combating of Rape Act 2000 (Namibia) s 1(3).

11.88 Other significant reforms in the Act include:

- increased sentences for convicted rapists;
- stringent bail conditions along with a bail hearing procedure that allows the survivor to inform the court of any threats they may face if the accused is released on bail;
- protections for rape survivors from irrelevant questions about their sexual history, and excluding evidence about their sexual reputation;
- greater protection for the survivor's privacy;
- eliminating archaic evidentiary rules based on the unsupported rape myth that women commonly make false accusations of rape, including:
 - o abolishing the rule requiring courts to treat the evidence of a complainant in a sexual offence case with special caution; and
 - o forbidding courts to draw any negative conclusions simply from the fact that a complainant did not tell anyone about the rape, or delayed reporting the assault.²⁰⁶
- allowing evidence of similar offences by the accused to be admitted during the trial; and
- strengthening the power of the judge to limit irrelevant cross-examination, and to prevent badgering or intimidation of witnesses.²⁰⁷

Rights of victims/survivors: Special duties of the prosecutor and the police

11.89 The Act recognises the importance of ensuring that survivors are kept informed of the criminal proceedings, and identifying their special interest in the possibility of bail being granted to the accused person. It does this by giving survivors the right to attend bail hearings, including hearings on any bail conditions, and the right to ask the prosecutor to give information relevant to the question of bail to the court (section 64).

11.90 It also recognises these rights by imposing special duties on the prosecutor and the Namibian Police Force. For example, the prosecutor must explain to a victim/survivor the criminal proceedings, and keep them informed about the progress of the relevant prosecution in order 'to lessen the impact of the trial' on the victim/survivor. The prosecutor must also seek the victim/survivor's views on any bail applications or possible bail conditions (section 9).

11.91 The investigating police officer must inform the prosecutor of any risk to the victim/survivor if bail is granted to the accused person, or if they become aware that the accused has not complied with any of the bail conditions (section 10).

RULES OF EVIDENCE AND PROCEDURE²⁰⁸

11.92 The *Combating of Rape Act* and the *Criminal Procedure Act* both contain important evidentiary rules relating to criminal proceedings for rape and other sexual offences. These Acts abolish some discriminatory common law rules and create some new rules that recognise the impact of rape. For example, the *Combating of Rape Act*:

- **abolishes the ‘cautionary rule’** relating to sexual and indecency offences, including the requirement for corroboration (section 5);
- **does not allow evidence of any delay** between commission of the alleged sexual offence and the complaint to be used to undermine the complainant’s evidence (section 7); and
- **allows evidence of the psychological effects of rape** to show that the alleged sexual offence is likely to have been committed against the complainant in coercive circumstances, and for the purpose of considering the extent of mental harm suffered in imposing an appropriate sentence (section 8).

11.93 The *Criminal Procedure Amendment Act* made the following important reforms in relation to evidence:

- **excludes evidence of, or questioning about, the complainant’s prior sexual conduct** without leave of the court, which it can only give in very limited circumstances. These include that such evidence or questioning ‘has significant probative value that is not substantially outweighed by its potential prejudice to the complainant’s personal dignity and right of privacy’ (section 227A(1)).
- **excludes evidence about the complainant’s sexual reputation** in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature (section 227A(2)).
- **removes the ‘cautionary rule’ on child witnesses**, requiring a court not to regard ‘the evidence of a child as inherently unreliable and therefore not treat such evidence with special caution only because that witness is a child’ (section 164(4)).

11.94 On procedure, the *Criminal Procedure Amendment Act* introduced a raft of possible special arrangements for ‘vulnerable witnesses’, which is defined as including children (under 18 years), victims/survivors of a sexual offence, including rape, and victims/survivors of family or domestic violence. It also includes a person:

who as a result of some mental or physical disability, the possibility of intimidation by the accused or any other person, or for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence.²⁰⁹

11.95 For these witnesses, the court can order ‘special arrangements’, including:

- relocating the trial while the evidence of the vulnerable witness is being heard;
- rearranging furniture in a court room, or directing that certain people sit or stand at certain locations in the court room;
- permitting a support person to accompany the witness while they give evidence, and to interrupt the proceedings to advise the court that the witness is experiencing undue distress; or
- allowing a witness to give evidence behind a screen or by closed circuit television (section 158A).

FIGURE 20: Summary of Namibia’s rape/sexual assault laws

Summary of Namibia’s legislative framework on rape/sexual assault	
Combating of Rape Act 2000	<ul style="list-style-type: none">▪ Creates a gender-neutral crime of rape, which is a sexual act committed under coercive circumstances▪ ‘Sexual act’ is defined broadly to include insertion of objects and body parts into genitalia, mouth or anus, as well as cunnilingus and any other genital stimulation. ‘Any other genital stimulation’ would include some non-penetrative sexual assaults, such as touching of a sexual nature▪ Focuses on the actions of the perpetrator in taking advantage of coercive circumstances or using force rather than the non-consent of the survivor▪ Includes a non-exhaustive list of ‘coercive circumstances’▪ Expressly criminalises rape in marriage: no marital exception▪ Removes the corroboration rule▪ Allows evidence of the psychological effects of rape to show that the alleged rape is likely to have been committed, and to determine sentence▪ Provides substantial minimum sentences for convicted rapists and stringent bail conditions for accused▪ Imposes special duties on the prosecutor and the police in relation to survivors
Combating of Immoral Practices Act 1980	<p>Creates the offences of:</p> <ul style="list-style-type: none">▪ unlawful sexual acts against children under 16 years of age by another person who is more than three years older and who is not married to them; and▪ unlawful carnal intercourse with ‘any female idiot or imbecile’ in circumstances that do not amount to rape.²¹⁰
Criminal Procedure Act 1977, as amended by the Criminal Procedure Amendment Act 2003	<ul style="list-style-type: none">▪ Excludes a negative inference being drawn from any delay in reporting the rape▪ Excludes evidence of, or questioning about, the complainant’s prior sexual conduct unless the court grants leave▪ Excludes evidence about the complainant’s sexual reputation▪ Removes the ‘cautionary rule’ on child witnesses▪ Provides a range of special measures for the protection of vulnerable witnesses, including children and survivors of rape/sexual assault

Reform process

- 11.96 As in most countries, rape law reform in Namibia was preceded by a long campaign led by women's rights groups and other members of civil society. In Namibia, this campaign began before independence from South Africa was achieved, and continued right up to the adoption, in 2000, of the *Combating of Rape Act*. Local NGOs continue to advocate for changes to strengthen the law and improve its implementation.
- 11.97 A key advocate—the Namibian Legal Assistance Centre—has chronicled the movement for rape law reform. It records the critical role played by local activists and legal experts in pushing for and developing effective rape law reform proposals over a long period. A summary follows.

FIGURE 21: Achieving rape law reform in Namibia

Reform of rape law in Namibia

In 1989, Women's Solidarity (an NGO that provided education on violence against women and counselling for victims) published a paper proposing law reform in this area, with specific recommendations backed up by comparative research. It continued to lobby relentlessly for these reforms. A petition to government followed. It was signed by 10 NGOs and presented to the Minister of Justice as part of the commemoration of International Women's Day in March 1993.

In the same year, the Namibia Women's Agricultural Association made a formal request to the Law Reform and Development Commission to consider the option of imposing a minimum penalty for convicted rapists. This proposal was supported by the Legal Assistance Centre, which provided the Government with detailed research on the constitutionality of such a step, and on approaches to rape sentencing in other countries.

Shortly after this, the Namibian Law Society, which represents all practising lawyers, gave its official support to sentencing guidelines, as well as a range of other rape law reforms.

In May 1994, another petition on law reform, signed by representatives from five government ministries and 10 NGOs and, again, including specific demands for reform of the law on rape, was presented to the Ministry of Justice.

In 1995, in the wake of a brutal attempted rape of a woman journalist in the capital, Windhoek, the Namibia Media Women's Association presented another petition to the Law Reform and Development Commission that included demands for stiffer sentences and the elimination of bail for accused sexual offenders.

Violence against women in general has been the topic of a substantial number of grassroots demonstrations. In 1995, there was also a community-based group of men who called for law reform, and made a broad range of recommendations on government and community strategies to combat rape.

Finally, in July 1997, a *Combating of Rape Bill* was prepared by the Law Reform and Development Commission and circulated for public comment.

The final impetus for reform was widespread public anger at the rape of a two-year-old girl. A series of public demonstrations were held, including a month-long protest in Windhoek, organised by a network of NGOs and government bodies (called the Multi-Media Campaign on Violence Against Women and Children). Many prominent political figures joined in these demonstrations.²¹¹

Implementation of the law

*The law is there, but it is all the small things that make the process of accessing their rights difficult for women.*²¹²

11.98 Some challenges with implementation that were identified in the research which relate to the low social and economic position of women and girls in Namibia have become evident. For example, an interviewee who works with survivors of gender-based violence, including rape, reported the lack of access to money and financial independence as a significant difficulty faced by women trying to access the law for protection from and redress for rape/sexual assault. She made the following observations:

- Many women do not have money to travel to the nearest police station to report the crime, to the hospital or medical clinic, or to court. If they report the rape to the police, they will need to make these journeys numerous times.
- Lack of money and other factors, such as lack of childcare, may also delay women from going to the police or the hospital for several days after the assault, by which time a lot of physical evidence of the rape will have been lost.
- Many cases are withdrawn by women who are raped by their husband or boyfriend, as they and their children are financially dependent on him.
- Many women do not complete the rape complaint form properly because of unfamiliarity with the language used in the form, limited literacy, and trauma caused by the sexual assault. They omit key information, which means the case cannot progress.

*The women are not empowered.*²¹³

11.99 The interviewee also observed the following:

- Police require further training and understanding of rape so that they do not send female complainants home to resolve the matter within the family.
- The law needs to take account of the fact that often there is little or no physical evidence available, including because women delay reporting, or remove their clothing and wash after the rape. This should not be a barrier to a victim/survivor telling their story to a court and accessing justice.
- The law should be amended to provide that only a magistrate or judge can decide that a case will not proceed; the complainant should not be able to withdraw it.

FIGURE 22: Checklist for Namibia's rape/sexual assault laws

Checklist for Namibia's rape/sexual assault laws <i>These criteria are the same as those listed for rape/sexual assault laws in Part A of this report</i> Yes Partly No Unknown	
1. Equality and non-discrimination	
a. Gender-neutral: The crime should be gender-neutral. Any person, regardless of sex or gender, sexual orientation or gender identity or any other characteristic can be raped. The definition should not exclude any potential victim/survivor.	
b. No exception for rape/sexual assault in marriage: The law should clearly state that there is no exception for rape/sexual assault in civil, customary or religious marriages, or marriage-like relationships. ²¹⁴	
c. No time limits: Prosecutions for rape/sexual assault should not be statute barred, regardless of the length of time between the alleged offence and charging.	
2. Definition of the crimes should not exclude any relevant conduct	
a. Penetration by body parts and objects: Any offence criminalising 'rape' should capture all types of non-consensual penetration: i.e. of mouth, anus or genitalia by a penis and of anus or genitalia by any other body part or object. 'Rape' should not be limited to penetration of a vagina by a penis.	
b. Penetration, however slight: The definition should specify that penetration, however slight, or to any degree, is sufficient for the crime to be made out.	
c. Other forms of sexual assault: The law should make clear that all non-consensual sexual conduct constitutes sexual assault.	
d. Sexual offences against children: Separate contact sexual offences against children should include all sexual contact with children under the age of consent, subject to close-in-age exceptions.	
3. Dignity and respect	
a. A crime of power and violence, not morality: Crimes of rape/sexual assault, including sexual offences against children, should be categorised as crimes of power and violence against the physical and mental integrity, and sexual autonomy, of the victim/survivor, and not as an offence against morality, modesty, property or honour. The language used in the offences should reflect this.	
b. Respectful language: The definition of the crimes and defences available, and laws dealing with sentencing, should use language that is respectful, does not perpetuate negative stereotypes and is not moralistic or derogatory. For example, it should not:	

Checklist for Namibia's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

- **devalue or disparage** people with disability, or use terms such as 'imbecile' or 'idiot';

Comment: The Combating of Immoral Practices Act makes it an offence for a person 'to have unlawful carnal intercourse with, or indecently assault any female idiot or imbecile in circumstances which do not amount to rape' (section 15).



- **perpetuate gender or other discriminatory stereotypes or be moralistic.** For example, 'defilement' in relation to rape/sexual assault of children is an archaic term meaning 'to pollute' or 'to sully' and, in the context of sexual offences, refers to sexual assault of minors. It is linked to the cultural and religious importance given to the virginity of unmarried girls in many societies. However, it is a discriminatory term, as it suggests that girls have been 'spoilt' or 'damaged' by the offence.²¹⁵ Sexual offences against children should use neutral and precise terminology and be aligned with language and approach taken in good practice rape/sexual assault provisions.

Comment: Use of derogatory terms to refer to people with disability perpetuate discriminatory stereotypes.



4. Rape/sexual assault is non-consensual

Comment: The rape provisions do not use the term 'consent' as the offence is constructed around the unlawful conduct being intentionally committed by the perpetrator in 'coercive circumstances' rather than without consent. Therefore, the term is not defined in the Act. However, in the context of 'coercive circumstances', free and voluntary agreement or consent to the sexual activity can never be given.

- a. **Non-consensual:** Rape/sexual assault should be defined as non-consensual sexual intercourse (or similar terminology).



- b. **Definition of consent:** Consent should be defined to mean unequivocal, free and continuing agreement to the sexual conduct.



- c. **Submission is not consent:** The law should make clear that passivity or submission by the victim/survivor does not equal consent.



- d. **Physical resistance not necessary:** The law should expressly state that lack of evidence of physical resistance or lack of evidence of physical injury to the victim/survivor is not, by reason only of that fact, to be regarded as consent to the act.



Checklist for Namibia's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

e. Consent cannot be given: The law should give an inclusive list of circumstances in which consent cannot be given. For example, circumstances where:

- the person submits because of force, threat, or fear of harm of any type, to themselves or another;
- the person submits because they are unlawfully detained;
- the person is asleep or unconscious, for example due to alcohol or drugs, so is incapable of freely agreeing;
- the person is incapable of understanding the nature of the act;
- the person is mistaken about the nature of the act, e.g., that it is for medical purposes or spiritual wellbeing;
- the person is mistaken about the identity of the other person;
- the person submits out of respect or fear due to another person's position of authority, trust or responsibility;
- the person submits because of threats to shame, degrade or humiliate them or another;
- the person is a child;
- the person withdraws consent during the act after initially consenting to it.



Comment: Although Namibia's rape law includes coercive circumstances in which consent cannot be given, the law could be strengthened by adding situations of 'coercive control' and 'withdrawal of consent'.

5. Available defences

Comment: The Combating of Rape Act does not provide for defences.

a. Honest but mistaken belief in consent or age: The law should limit the common law mistake of fact defences of honest but mistaken belief in consent and honest but mistaken belief in age (where the victim is under the age of consent) to situations where the accused can point to evidence indicating that they took reasonable steps to ascertain consent or age, as the case may be.



b. No defence of provocation: The law should not allow defences to rape of provocation (e.g., adultery or suspected adultery), honour, punishment, or passion.



Checklist for Namibia's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

6. Rules of evidence and procedure

a. Rules of evidence in criminal proceedings for rape should make clear that:

- | | |
|--|---|
| ▪ No corroboration: Corroboration by a third party of the victim/survivor's testimony is not required. | ● |
| ▪ Equality of arms: The prosecution and defence are equal in the evidence they can lead and the weight given to that evidence. | ● |
| ▪ Prior sexual behaviour/Rape Shield Law: Evidence of a complainant's prior sexual conduct with the accused or another person is presumptively inadmissible and only allowed with the prior leave of the court and never to infer that, because of the sexual nature of that conduct, the victim is more likely to have consented to the sexual activity at issue or is less worthy of belief in respect of their assertion that they did not consent to the sexual activity at issue. Such evidence can only be adduced for legitimate purposes, such as to establish that a complainant made an inconsistent statement. | ● |

b. Rules of procedure: The rules of procedure should give a judge or magistrate hearing a charge of rape a general power to order measures to protect the safety and wellbeing of the survivor, including, for example, to close the court to the public or to make orders allowing the following for the victim/survivor:

- | | |
|---|---|
| ▪ Testimony by video: Give testimony by video link. | ● |
| ▪ Shielded from accused: Be shielded from the defendant in court, e.g., by a curtain. | ● |
| ▪ Accompanied by a friend: Be accompanied by a friend or carer for support in the witness box. | ● |
| ▪ Identity: Choose whether to have their identity concealed. | ● |

7. Appropriate penalties

- | | |
|--|---|
| Reflect gravity of the crime: Penalties for rape/sexual assault should reflect the gravity of the crime, and exclude the death penalty and corporal punishment as contrary to international human rights law. | ● |
|--|---|

Checklist for Namibia's rape/sexual assault laws <i>These criteria are the same as those listed for rape/sexual assault laws in Part A of this report</i> Yes Partly No Unknown	
8. Mediation and settlement are not replacements for criminal prosecution	
Comment: <i>Namibian law is silent on these points.</i>	
Express prohibition: The law should prohibit the following:	
a. Mandatory mediation, conciliation or reconciliation between the victim/survivor and the perpetrator.	
b. Monetary settlement in place of criminal prosecution.	
c. Marriage between the perpetrator and the victim/survivor in place of criminal prosecution.	
9. Implementation and monitoring	
a. An independent monitoring process: To ensure the law is effective, it should establish an independent, expert monitoring process, such as a multi-agency body with authority to monitor the implementation of the law and make recommendations to government;	
b. Collect disaggregated data: The law should require all justice sector actors (courts, police prosecutors, and public solicitors such as legal aid) to collect data, for example, on number of rape complaints, rape investigations completed, rape charges laid, convictions, acquittals, and related data. All data should be disaggregated by sex, age, disability status, and by other factors as relevant to the local circumstances.	
Comment: <i>This is not mandated in the legislation, but justice sector actors, including the Namibian Police Force, do collect some data in relation to rape complaints.</i>	
c. Publish data and information for transparency and accountability: Some information from data collected should be published and made available to the public, including data from the justice sector agencies, as well as court decisions (anonymised to protect the victim).	

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- 203 *Combating of Immoral Practices Act 1980* (Namibia) ss 14 & 15.
- 204 Narnia Bohler-Muller, 'Valuable lessons from Namibia on the combating of rape' (2001) 14(1) *South African Journal of Criminal Justice* 74, quoted in Dianne Hubbard et al, *Rape in Namibia, An Assessment of the Operation of the Combating of Rape Act – Summary Report* (Rape in Namibia) (Legal Assistance Centre, Namibia, 2006) <<http://www.lac.org.na/pub/publications.php>> (last accessed March 2019).
- 205 For a history of the Parliamentary debates on the *Combating of Rape Act*, see D Hubbard, 'Gender and Sexuality: The Law Reform Landscape', in Suzanne LaFont and Dianne Hubbard (eds), *Unravelling Taboos: Gender and Sexuality in Namibia* (Legal Assistance Centre, Namibia, 2008) on file with authors.
- 206 *Ibid* 5-6.
- 207 *Ibid* 7.
- 208 For a detailed discussion of the *Criminal Procedure Amendment Act 2003*, see Pamela J Schwikkard, 'The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act', [2009] 1(1) *Namibia Law Journal* 5 <https://www.kas.de/c/document_library/get_file?uuid=9694e3af-a65a-0f18-c183-fb777c5764f1&groupId=252038> (last accessed March 2019).
- 209 *Criminal Procedure Amendment Act 1977* (Namibia) s 158A.
- 210 The authors note that, in using this derogatory language and in not being disability-neutral, the laws do not meet the good practice criteria for sexual offences in relation to people with disability.
- 211 D Hubbard, *Gender and Law Reform in Namibia* (Legal Assistance Centre, Namibia, 1999) <<http://www.lac.org.na/pub/publications.php>> (last accessed March 2019); also, Schwikkard, above n208.
- 212 Interview with Namibian social worker specialising in working with survivors of gender-based violence (by phone 18 March 2019) on file with authors.
- 213 *Ibid*.
- 214 Exemptions or immunity for rape in marriage are inconsistent with international law under the ICCPR, CRC and CEDAW.
- 215 Forster & Jivan, above n67.

Caribbean and the Americas: Guyana[‡]

Guyana's legislative framework on rape/sexual assault

- 11.100 Guyana undertook major reforms of its rape/sexual assault laws when it enacted the *Sexual Offences Act 2010*. Further reforms were made to the law in the *Sexual Offences Amendment Act 2013*.
- 11.101 Guyana's High Court has established a specialist Sexual Offences Court to hear all first instance charges of rape/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 additional specialist court rooms for the Sexual Offences Court in other parts of the country.

SEXUAL OFFENCES ACT 2010

Definition of the crime

- 11.102 The *Sexual Offences Act* distinguishes between penetrative sexual offences (rape) and other sexual offences (sexual assault).
- 11.103 Section 3 creates and defines the offence of 'rape,' and sets the maximum penalty as life imprisonment. The crime is gender-neutral:
- 3.(1) A person ("the accused") commits the offence of rape if –
- (a) the accused –
 - (i) engages in **sexual penetration** with another person ("the complainant"); or
 - (ii) causes the complainant to engage in sexual penetration with a third person;
 - (b) the complainant **does not consent** to the penetration; and
 - (c) the accused does not **reasonably believe** that the complainant consents.
- 11.104 Section 4 criminalises 'sexual assault', which includes 'touching in a sexual way', whether by the accused or another person, or causing the complainant to touch the accused or another person in a sexual way. It also includes other 'indecent assault'.
- 11.105 'Sexual,' 'sexual activity' and other key terms are defined in section 2 as including 'penetration' (also defined, see below) and 'touching':
- "sexual"** includes penetration, touching or any other activity if a reasonable person would consider that –
- (i) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual; or

[‡] This is a summary only. It is not a comprehensive description or analysis of Guyana's laws.

- (ii) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual;

“sexual activity” includes touching;

“touching” includes touching -

- (i) with any part of the body, which includes a part surgically constructed (in particular, through gender reassignment surgery);
- (ii) with anything else;
- (iii) through anything;

“vagina” includes vulva meaning the region of the external genital organs of the female and in relation to an animal, references to the vagina or anus include references to any similar part.

11.106 Section 2 also defines ‘penetration’:

“penetration” means any intrusion however slight and for however short a time, of any part of a person’s body or of any object into the vagina or anus of another person and any contact, however slight and for however short a time, between the mouth of one person and the genitals or anus of another, including but not limited to sexual intercourse, cunnilingus, fellatio, anal intercourse and female to female genital contact and—

- (i) where the penetration is by the penis, the emission of seminal fluid is not necessary to prove the penetration;
- (ii) penetration is a continuing act from entry to withdrawal;

Marital rape

11.107 There is no exception for rape in marriage.

A marital or other relationship, previous or existing, is not a defence to a charge of any offence under this Act. [Nor is a] proposal of marriage, made by the accused or any other party, to the complainant [...] a defence to [...] a charge of any offence under this Act.

Sexual Offences Act 2010 (Guyana) s 37

Consent

11.108 Section 2 defines ‘consent’:

“consent” means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or other sexual contact

11.109 Sections 7 and 8 elaborate on the meaning of consent. Section 7 includes a list of circumstances in which consent cannot be given, including:

- use, or threat of use, of violence against the complainant or another person;
- unlawful detention of the complainant;
- the complainant was 'stupefied or overpowered' by a substance they took or which was administered without their consent;
- intimidation of the complainant caused by the presence of other people;
- the complainant was asleep or unconscious;
- because of the complainant's physical disability, the complainant would not have been able to communicate consent or non-consent to the sexual activity;
- the complainant lacks the capacity to choose whether to agree to sexual activity or to communicate such a choice to the accused because of 'a mental disorder';
- abuse of a position of power or authority;
- the complainant expressed a lack of agreement to the sexual activity or withdrew their consent during the activity; and
- the accused deceived the complainant as to the nature or purpose of the sexual activity, or by impersonating another person.

11.110 If the defence of belief in consent is raised, the belief must be objectively reasonable in all the circumstances. This includes whether the accused took any steps to find out whether consent to sexual activity was given. However, the accused person cannot rely on the reasonable belief defence if they held that belief because they were drunk, reckless, or wilfully blind, or did not take reasonable steps to find out if consent was given.²¹⁶

Sexual offences against children

11.111 Children under the age of 16 years cannot consent to sexual activity in any circumstance (section 9). Sixteen years is the age of consent to sexual conduct for boys and girls in Guyana. There is no defence of reasonable mistake as to the age of the child in sexual offences cases.

11.112 The Act contains specific child sex offences, including rape or sexual assault of a child under 16 years of age, causing a child to watch a sexual act, including an image of sexual activity, and 'grooming'.²¹⁷

Sexual grooming occurs when an accused would have met or communicated with the complainant in order to induce or cause them to engage in some form of sexual activity with the person.²¹⁸

11.113 Some *close-in-age* defences are available, however, provided that the accused person is not in a 'position of trust' in relation to the child.

11.114 A 'position of trust' is defined in section 7 to include where:

- the accused looks after persons, including the complainant, detained in an institution under a court order or under any law;
- the accused looks after persons, including the complainant, who are accommodated and cared for in one of the following institutions:
 - o a hospital;
 - o an independent clinic;
 - o a care home, residential care home or private hospital; or
 - o a community home, voluntary home, children's home or orphanage;
- the accused looks after persons who are receiving education at an educational institution (whether in the role of teacher or in another role), and the complainant is receiving, and the accused is not receiving, education at that institution;
- the accused is the guardian of the complainant;
- the accused is the legal or reputed husband or wife of one of the complainant's parents or guardians;
- the complainant is in vocational training and the accused looks after the complainant on an individual basis; or
- the accused is a social worker, probation officer, coach, instructor, minister of religion, babysitter, childminder, or has a welfare position in relation to the complainant and has regular unsupervised contact with the complainant.

Special duties of the police

11.115 Every complaint must be recorded and investigated by the police. The Act imposes a three-month time limit on laying charges or sending the report to the Director of Public Prosecutions for advice (section 41). Failure to do so constitutes 'neglect of duty', and attracts disciplinary charges under the *Police (Discipline) Act*.

11.116 The Act covers protection for the complainant, including specifying that the complainant cannot be compelled to recount the complaint in the presence of the accused person during the investigation, or be in their presence other than for identification purposes. In this case, an audio-visual link or a two-way mirror or other measure to protect the wellbeing of the complainant must be used (section 42).

Rules of procedure and evidence

11.117 The *Sexual Offences Act* deals with evidential and procedural rules relating to all sexual offences. In relation to procedure, it provides for:

- paper committals rather than oral preliminary inquiry (section 43);
- the exclusion of the public and media from the hearing unless certain circumstances exist (sections 45–50);

- a range of special measures to protect the complainant when they give evidence, including:
 - o screening the witness from the accused;
 - o the giving of evidence via audio-visual link;
 - o examining a child witness through an intermediary; and
 - o the use of anatomically correct dolls to assist child witnesses (sections 53, 55–59);
- protection of the identity of the complainant or witness which cannot be published, even with the consent of the person concerned (section 62).

11.118 On rules of evidence, the Act sets out the following:

- A judge should inform the jury that complainants of sexual offences display a wide range of responses during and after the attack, and that the absence of behaviour that the jury might expect a complainant of a sexual offence to display should not be taken as evidence that the offence charged did not take place (section 52). This means, among other things, that consent and belief in consent by the accused person cannot be inferred, such as from the fact that the victim did not put up any physical resistance.
- No corroboration is necessary (section 69).
- The ‘fresh complaints’ doctrine does not apply, and a judge should warn the jury that a delay in reporting a sexual offence does not necessarily indicate that the allegation is false, and should inform the jury of the ‘good reasons why a victim of a sexual offence may refrain from making a complaint’ (section 71).
- A statement made by a child complainant is admissible as evidence even if the child does not give direct oral testimony at the trial (section 73).
- Evidence of prior sexual activity or reputation of the complainant is inadmissible (section 78).

Prevention of sexual offences - Task Force and Sexual and Domestic Violence Unit

11.119 Guyana’s *Sexual Offences Act* is unusual in that it establishes two mechanisms for the prevention of sexual violence: the inter-agency National Task Force for the Prevention of Sexual Violence (the **Task Force**) and the Sexual and Domestic Violence Unit (**SDVU**) in the Ministry of Social Protection,²¹⁹ which is to support the Task Force.

11.120 The Task Force is required to develop and implement a national plan for the prevention of sexual violence,²²⁰ develop other initiatives, commission and co-ordinate the collection and publication of data, develop policies to facilitate Government work with NGOs on the prevention of sexual violence, and the provision of assistance to victims/survivors, assist the SDVU, co-ordinate national education and awareness programs, evaluate such programs for effectiveness, and provide guidance on training programs mandated under the Act.

11.121 The establishment of mechanisms for the implementation and oversight of the criminal law on sexual offences, including prevention, is consistent with good practice standards.

Public awareness

11.122 The Minister, in co-operation with government agencies and NGOs, is to conduct public awareness programmes to educate victims/survivors and potential victims/survivors and their families on sexual offences, and to discourage behaviour that leads to abuse. For example, programmes to raise awareness of:²²¹

- the harms caused by sexual violence;
- appropriate and inappropriate behaviour towards children;
- services available for victims/survivors;
- how to make a complaint to the police; and
- other places to seek help.

11.123 Section 91 of the Act specifies that participants in the justice sector, from the police to judges and probation officers, as well as health and social workers must be trained on sexual violence.

Collection of data

11.124 Similarly, the requirement under the Act for the collection of a range of data on sexual offences is a key aspect of a good practice sexual offences law. Section 89 requires the collection of data on a range of matters, including:

- the number of complaints made to the police, and the number of arrests, prosecutions and convictions;
- the age and gender of victims/survivors and complainants;
- where the offence took place;
- types of injuries sustained;
- the relationship of the accused to the complainant; and
- the number of matters withdrawn from court.

FIGURE 23: Summary of Guyana’s rape/sexual assault laws

Summary of Guyana’s legislative framework on rape/sexual assault	
<i>Sexual Offences Act 2010</i>	<ul style="list-style-type: none">▪ Creates gender-neutral crimes of rape and sexual assault▪ Defines rape broadly as including insertion of objects and body parts into genitalia, mouth or anus▪ Defines sexual assault as including touching of a sexual nature and other indecent assaults▪ Expressly excludes the marital rape exception▪ Defines consent as freely given and informed agreement to sexual activity with words or overt actions by a person capable of giving consent, and includes a list of circumstances in which consent cannot be given▪ Creates specific sexual offences against children, including:<ul style="list-style-type: none">○ Rape or other sexual activity with a child under 16 years of age;○ Causing a child under 16 years of age to watch a sexual act;○ Meeting a child under 16 years of age following sexual grooming;○ Sexual activity with a child family member (incest);○ Sexual activity with a child by abusing trust or authority;○ Arranging or facilitating the commission of a child sex offence.▪ Includes specific sexual offences with ‘vulnerable adults’, including with people with a ‘mental disorder’ by family members and others▪ Does not require evidence of a physical resistance to rape/sexual assault, or of any other particular reaction or behaviour by the complainant during or after the attack▪ Expressly excludes the corroboration and fresh complaint common law rules▪ Establishes an interagency mechanism on the prevention of sexual violence▪ Mandates the collection of data▪ Requires the government to conduct public awareness programmes▪ Mandates the training of justice sector actors
<i>Domestic Violence Act 1996</i>	<ul style="list-style-type: none">▪ Creates a domestic violence offence and a regime for protection orders▪ Domestic violence is defined so as to include rape

Reform process

- 11.125 In 2007, the then Minister for Human Services and Social Security published a Consultation Paper outlining the case for reform of the sexual offences laws. In her foreword, the Minister wrote:

Sexual violence is the most widespread and unpunished of crimes. It destroys lives, families and communities, holds back our society and economy, and spreads HIV/AIDS and other STDs.

Our laws are centuries out of date, and our system is failing to deliver either justice or support to victims. This is unacceptable.

Sexual violence, like any other form of violence, has no place in our society, and we aim to stamp it out.²²²

- 11.126 The Minister conducted a nationwide public consultation process to inform the public about the problems with the old laws, including very low conviction rates for rape/sexual assault, and explaining the changes the Government wanted to make. Comments and feedback on the proposed reforms were sought from every sector of the community. After the consultation period, NGOs and other experts contributed substantively to the drafting of the reform law. This process led to the good practice law that was enacted in 2010. One interviewee from civil society pointed out that having an entire chapter on prevention of sexual violence in a law was very unusual, and illustrates the contribution of experts from civil society to the drafting process. She said, 'an entire chapter on prevention [of sexual violence], in a law, is quite remarkable'.

Implementation of the law

- 11.127 The reforms seem to have resulted in an increase in complaints of rape/sexual assault. One interviewee from civil society speculated that this could be because of the inclusion of a broader definition for the crime in the law. Another said that the establishment of the Sexual Offences Court may have led to an increase in reporting, especially of sexual offences against children. She said that this may be because people are now aware that children can give evidence via video link rather than in open court, which is less intimidating. This is to be considered in light of the views of another interviewee, from local civil society, who said the process remains traumatic for the complainant and their families and more needs to be done to support them. We also received reports that the judges of the specialist Sexual Offences Court are 'pretty good', as they have received a lot of training and tend to have a good understanding of the Act and the nature and harms of sexual violence. The current Acting Chief Justice and the Chancellor were credited for spearheading training of the judiciary and ensuring that the special court operates effectively.
- 11.128 Some interviewees also identified changing attitudes towards complainants of rape and sexual assault as a benefit of the reforms, as well as increased awareness about the law and the impact of sexual violence among the community. Nonetheless, interviewees said that there was still a long way to go to improve attitudes and, especially, to drop the blame-the-victim mindset.

- 11.129 In terms of challenges to implementation, it was pointed out that there is only one courtroom in the Sexual Offences Court in the capital with specialist facilities for sexual violence trials, and that access to it is difficult for regional and remote communities. One person commented that when it comes to attitudes towards and access to justice for rape and other sexual offences, 'there is a very different picture outside of the interior of the country.'
- 11.130 An interviewee with long involvement in working with women experiencing violence, including sexual violence, referred to several areas where the reforms have not been properly implemented. For example, they identified several challenges with the police, including the following:
- **Delays in charging rape/sexual assault:** Police rarely lay charges of rape/sexual assault within the three-month period required under the *Sexual Offences Act*. This may be due to a lack of resources or training, or for other reasons. The police are reluctant to believe a child reporting rape/sexual assault.
 - **Turning away children:** In Guyana, most cases of rape/sexual assault are of children. They had heard of cases of children, who wished to report a rape/sexual assault against them to the police, being told by the police to go away and come back with an adult.
 - **Not believing children:** The police are reluctant to believe children accusing someone of rape/sexual assault. There were cases reported in which a child victim/survivor went to the police with a family member to make a rape/sexual assault complaint, and during the interview of the child, the adult intervened and accused the child of lying, at which point the police abandoned the interview and did not pursue the investigation.
- 11.131 There was recognition that a good law on its own was insufficient, and that it was essential 'to have the whole system working', including the health sector. For example, community health workers often receive the first disclosure of rape/sexual assault. If it is a child who discloses, the health workers are required by law to report it to the authorities. However, many of them live and work in small communities, so they may be reluctant to report the abuse for fear of reprisals or exclusion from the community.
- 11.132 A repeated concern with the implementation of the legislation was the failure to properly implement the Task Force for Preventing Sexual Violence. Several interviewees said that it has not been properly implemented and is not performing its legislated role.
- 11.133 There was a consistent view that, despite the challenges, overall the *Sexual Offences Act* is a good model. One interviewee said, "in the Caribbean, the legislation is very forward-looking." However, another said, "it's a constant lament. We have great laws but it is the implementation that is lagging behind."

FIGURE 24: Checklist for Guyana’s rape/sexual assault laws

<div>Checklist for Guyana’s rape/sexual assault laws</div> <div><i>These criteria are the same as those listed for rape/sexual assault laws in Part A of this report</i></div> <div>● Yes ● Partly ● No ● Unknown</div>	
1. Equality and non-discrimination:	
a. Gender-neutral: The crimes should be gender-neutral. Any person, regardless of sex or gender, sexual orientation or gender identity or any other characteristic can be raped. The definition should not exclude any potential victim/survivor.	●
b. No exception for rape/sexual assault in marriage: The law should clearly state that there is no exception for rape/sexual assault in civil, customary or religious marriages, or marriage-like relationships. ²²³	●
c. No time limits: Prosecutions for rape/sexual assault should not be statute barred regardless of the length of time between the alleged offence and charging.	●
2. Definition of the crimes should not exclude any relevant conduct	
a. Penetration by body parts and objects: Any offence criminalising ‘rape’ should capture all types of non-consensual penetration: i.e. of mouth, anus or genitalia by a penis and of anus or genitalia by any other body part or object. ‘Rape’ should not be limited to penetration of a vagina by a penis.	●
b. Penetration, however slight: The definition should specify that penetration, however slight or to any degree is sufficient for the crime to be made out.	●
c. Other forms of sexual assault: The law should make clear that all non-consensual sexual conduct constitutes sexual assault.	●
d. Sexual offences against children: Separate contact sexual offences against children should include all sexual contact with children under the age of consent, subject to close-in-age exceptions.	●
3. Dignity and respect	
a. A crime of power and violence, not morality: Crimes of rape/sexual assault should be categorised as crimes of power and violence against the physical and mental integrity, and sexual autonomy of the victim/survivor and not as offences against morality, modesty or honour.	●

Checklist for Guyana's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

<p>b. Respectful language: The definition of the crimes and defences available, and laws dealing with sentencing, should use language that is respectful, does not perpetuate negative stereotypes, is moralistic or derogatory. For example, it should not:</p>	<p>●</p>
<p>▪ devalue or disparage people with disability, such as 'imbecile' or 'idiot';</p>	<p>●</p>
<p>▪ perpetuate gender discriminatory stereotypes or be moralistic. For example, 'defilement' in relation to rape/sexual assault of children is an archaic concept meaning 'to pollute' or 'to sully' and, in the context of sexual offences, refers to sexual assault of minors. It is linked to cultural and religious importance given to the virginity of unmarried girls in many societies. However, it is a discriminatory term as it indicates that girls are 'spoilt' or 'damaged.'²²⁴ Sexual offences against children should use neutral and precise terminology and be aligned with language and approach taken in good practice rape/sexual assault provisions.</p>	<p>●</p>
<p>4. Rape/sexual assault is non-consensual</p>	
<p>a. Non-consensual: Rape/sexual assault should be defined as non-consensual sexual intercourse (or similar terminology).</p>	<p>●</p>
<p>b. Definition of consent: Consent should be defined to mean the unequivocal, free and continuing agreement to the sexual conduct.</p>	<p>●</p>
<p>c. Submission is not consent: The law should make clear that passivity or submission by the victim/survivor does not equal consent.</p>	<p>●</p>
<p>d. Physical resistance not necessary: The law should expressly state that lack of evidence of physical resistance or lack of evidence of physical injury to the victim/survivor is not, by reason only of that fact, to be regarded as consent to the act.</p>	<p>●</p>

Checklist for Guyana's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

e. Consent cannot be given: The law should give an inclusive list of circumstances in which consent cannot be given. For example, circumstances where:

- the person submits because of force, threat, or fear of harm of any type, to themselves or another;
- the person submits because they are unlawfully detained;
- the person is asleep or unconscious, for example due to alcohol or drugs, so is incapable of freely agreeing;
- the person is incapable of understanding the nature of the act;
- the person is mistaken about the nature of the act, e.g., that it is for medical purposes or spiritual wellbeing;
- the person is mistaken about the identity of the other person;
- the person submits out of respect or fear due to another person's position of authority, trust or responsibility;
- the person submits because of threats to shame, degrade or humiliate them or another;
- the person withdraws consent during the act after initially consenting to it.

●

Comment: Although Guyana's Sexual Offences Act 2010 lists circumstances in which consent cannot be given, the law could be strengthened by adding situations of 'coercive control'.

5. Available defences

a. Honest but mistaken belief in consent or age: The law should limit the common law mistake of fact defences of honest but mistaken belief in consent and honest but mistaken belief in age (where the victim is under the age of consent) to situations where the accused can point to evidence indicating that they took reasonable steps to ascertain consent or age, as the case may be.

●

b. No defence of provocation: The law should not allow defences to rape of provocation (e.g. adultery or suspected adultery), honour, punishment, or passion.

●

6. Rules of evidence and procedure

a. Rules of evidence in criminal proceedings for rape should make clear that:

- **No corroboration:** Corroboration by a third party of the victim/survivor's testimony is not required;

●

Checklist for Guyana's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

<ul style="list-style-type: none"> ▪ Equality of arms: The prosecution and defence are equal in the evidence they can lead and the weight given to that evidence; and 	●
<ul style="list-style-type: none"> ▪ Prior sexual behaviour/Rape Shield Law: Evidence of a complainant's prior sexual conduct with the accused or another person is presumptively inadmissible and only allowed with the prior leave of the court and never to infer that, because of the sexual nature of that conduct, the victim is more likely to have consented to the sexual activity at issue or is less worthy of belief in respect of their assertion that they did not consent to the sexual activity at issue. Such evidence can only be adduced for legitimate purposes, such as to establish that a complainant made an inconsistent statement. 	●
<p>b. Rules of procedure: The rules of procedure should give a judge or magistrate hearing a charge of rape a general power to order measures to protect the safety and wellbeing of the victim/survivor, including for example, to close the court to the public or to make orders allowing for the following for the victim/survivor:</p>	●
<ul style="list-style-type: none"> ▪ Testimony by video: Give testimony by video link; 	●
<ul style="list-style-type: none"> ▪ Shielded from accused: Be shielded from the defendant in court, e.g., by a curtain; 	●
<ul style="list-style-type: none"> ▪ Accompanied by a friend: Be accompanied by a friend or carer for support in the witness box; and 	●
<ul style="list-style-type: none"> ▪ Identity: Choose whether to have their identity concealed. <p>Comment: <i>The Sexual Offences Act 2010 prohibits the identification of a rape/sexual assault complainant's identity.</i></p>	●
7. Appropriate penalties	
<p>Reflect gravity of the crime: Penalties for rape/sexual assault should reflect the gravity of the crime, but exclude the death penalty and corporal punishment as contrary to international human rights law.</p>	●

Checklist for Guyana's rape/sexual assault laws

These criteria are the same as those listed for rape/sexual assault laws in Part A of this report

● Yes ● Partly ● No ● Unknown

8. Mediation and settlement are not replacements for criminal prosecution

Comment: The Sexual Offences Act 2010 is silent on these points. This may be because they are not regularly practised in Guyana and therefore not necessary to address directly in law.

Express prohibition: The law should prohibit the following:

a. Mandatory mediation, conciliation or reconciliation between the victim/survivor and the perpetrator;

b. Monetary settlement in place of criminal prosecution;

c. Marriage between the perpetrator and the victim/survivor in place of criminal prosecution.

9. Implementation and monitoring

a. An independent monitoring process: To ensure the law is effective, it should establish an independent, expert monitoring process, such as a multi-agency body with authority to monitor the implementation of the law and make recommendations to government.

b. Collect disaggregated data: The law should require all justice sector actors (courts, police prosecutors and public solicitors such as legal aid) to collect data, for example on number of rape complaints, rape investigations completed, rape charges laid, convictions, acquittals and related data. All data should be disaggregated by sex, age, disability status and by other factors as relevant to the local circumstances.

c. Publish data and information for transparency and accountability: Some information from data collected should be published and made available to the public, including data from the justice sector agencies, as well as anonymised court decisions.

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- 216 Help and Shelter & Rainbow House, *Stamp Out Sexual Abuse: Handbook on the Sexual Offences Act* (Help and Shelter and Rainbow House, Guyana, undated) <<http://www.hands.org.gy/soahandbook>> (last accessed March 2019).
- 217 *Sexual Offences Act 2010* (Guyana) ss 10–26.
- 218 Guyana Association of Women Lawyers, *The Law and You IV* (2011) 24 <<http://www.legallaid.org.gy/?q=node/8>> (last accessed March 2019).
- 219 *Sexual Offences Act 2010* (Guyana) s 88: the original name under the Act was Sexual Violence Unit, Ministry of Human Services and Social Security.
- 220 *Ibid* s 87.
- 221 *Ibid* s 90.
- 222 Priya Manickchand, Minister for Human Services and Social Security, Government of Guyana, *Stamp It Out!, Strengthening protection against sexual violence and reforming the law on sexual offences, Consultation Paper* (2007) <<http://www.hands.org.gy/files/Stamp%20it%20Out!.pdf>> (last accessed April 2019).
- 223 Exemptions or immunity for rape in marriage are inconsistent with international law under both the ICCPR and CEDAW.
- 224 Forster & Jivan, above n67.

12. Sexual offences and people with disability

Africa: Seychelles

Originally, Seychelles was a french [sic] colony before acceding to the British. The effect of this is that Seychelles has a unique mixed jurisdiction legal system.²²⁵

Seychelles legislative framework on rape/sexual assault

- 12.1 The Seychelles' laws criminalising rape or sexual assault are found in *Chapter 38: The Penal Code 1955* (the **Penal Code**).²²⁶ A range of sexual offences are found in Chapter XV – Offences Against Morality,²²⁷ including:
- sexual assault (section 130);
 - sexual interference with a child (section 135); and
 - sexual interference with a dependent (section 136).²²⁸
- 12.2 Procedures in relation to criminal offences are found in the *Criminal Procedure Code 1955* (the **Procedure Code**).²²⁹
- 12.3 It is important to note that the Seychelles' rape/sexual assault law only meets a small number of the good practice criteria listed in Part A, above. However, it is included here as an example of a country with a disability-neutral sexual assault law. This is explained below.

PENAL CODE

Definition of the crime

- 12.4 Section 130 of the *Penal Code* creates and defines the offence of 'sexual assault':

Sexual assault

130.(1) A person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years:

[...]

(2) For the purposes of this section "sexual assault" includes –

- (a) an indecent assault;
- (b) the non-accidental touching of the sexual organ of another;
- (c) the non-accidental touching of another with one's sexual organ; or
- (d) the penetration of a body orifice of another for a sexual purpose.

- 12.5 The definition in section 130(2) meets the general good practice criteria for rape/sexual assault set out in Part A, above, only to the extent that it is gender-neutral and encompasses conduct other than non-consensual penetration of a vagina by a penis. However, this broad definition may be undermined by the requirement in section 130(2)(d) that the penetration be for ‘a sexual purpose’. This is too narrow a test, and could exclude cases where sexual assault by penetration is committed for another purpose, for example to punish or intimidate a person. It also reflects the common misunderstanding that sexual assault is a sexual act rather than an exercise of power over another person.
- 12.6 Section 130(2)(d) was considered by the Seychelles’ Supreme Court in *R v Pierre*,²³⁰ but there is no discussion in the decision about the words ‘a sexual purpose’. The case is also relevant as it involved two victims, one of whom is a person with disability. It deals with a range of issues, including consent obtained by misrepresentation.

FIGURE 25: Seychelles’ rape case involving victim with disability

Republic v Frederic Pierre ²³¹

This case involved criminal prosecution of a police officer, Frederic Pierre, under section 130 of the *Penal Code*. The offences alleged involved sexual assault against a woman, Ms Maryvonne Loiseau, and her nephew, Mr Michel Moumou, at the home they shared with Ms Loiseau’s father. Mr Moumou is described by the court as being ‘a person of weak intellect’, ‘mentally retarded’, and ‘under medical treatment since his childhood’.

Mr Pierre was known to his victims as he was a member of the local police force and lived in the same neighbourhood as Ms Loiseau and Mr Moumou.

At the time of the offending, Mr Pierre had told the Family Support Unit Inspector that Mr Moumou had been sexually abused by another man. Mr Pierre was told to advise Mr Moumou to go to the police station to make a complaint, and that Mr Moumou would then be sent for examination.

The offences all took place on the same day. Mr Pierre visited the Loiseau house. He was not in uniform, but told Ms Loiseau that he was visiting because the doctor had sent him to do a medical test on her. He made her go into her father’s bedroom, take off her underwear and get into bed. He then inserted a candle in both her vagina and anus, and then inserted his own penis into her vagina. Ms Loiseau tried to resist but was told to shut up. The incidents were witnessed by Mr Moumou through the bedroom door.

Mr Pierre then left the bedroom and saw Mr Moumou. He told Mr Moumou that the doctor had asked him to do a test on him and asked him to go into the bedroom, remove his trousers and lie down on the bed. Mr Pierre opened Mr Moumou’s buttocks, looked at his anus, and then released him.

Ms Loiseau complained to police on the same day. Mr Pierre denied the allegations, including denying any sexual conduct.

At trial, Mr Pierre admitted to sexual intercourse, but alleged it was consensual, and that it was not the first time.

The court rejected Mr Pierre's version of events, and found that Mr Pierre had sexually assaulted Ms Loiseau both through non-consensual sexual intercourse and penetration of her vagina and anus with an object 'for a sexual purpose'.

The court further noted that even if Ms Loiseau had consented it would have been because of a misrepresentation by Mr Pierre that he had been asked to carry out tests for a doctor.

The court noted that it 'should warn itself of the danger of acting without [corroboration of the evidence of the Complainant], in all cases of sexual offence, irrespective of the sex of the complainant or the party involved.'²³² That said, the court found the evidence given by Mr Moumou was corroborative.

The court also found that Mr Pierre had sexually assaulted Mr Moumou, having committed an 'indecent act' against him. In Mr Moumou's case, any consent was obtained by misrepresentation and, as such, was invalidated. The court also found that Mr Moumou was not capable of consenting because he 'is [a] mentally retarded person of weak intellect, whose knowledge and understanding in my view, are such that he could not have given valid consent'.

Consent

- 12.7 Section 130(3) details the requirements in relation to consent. Acts specified in the section will be assaults if consent is absent:

(3) A person does not consent to an act which if done without consent constitutes an assault under this section if –

- (a) the person's consent was obtained by misrepresentation as to the character of the act or the identity of the person doing the act;
- (b) the person is below the age of fifteen years; or
- (c) the person's understanding and knowledge are such that the person was incapable of giving consent.

- 12.8 This provision complies with the good practice criteria in that it is disability-neutral. We note, however, that this neutrality on the face of the statute may be compromised if subsection (3)(c) is applied differently in relation to people with disability compared to people without disability.
- 12.9 In the case of *R v Pierre*, outlined above, the Supreme Court accepted the evidence of Mr Moumou, despite his apparent intellectual disability, and yet found that he was not capable of giving valid consent. It appears that this aspect of the findings was unnecessary, as Mr Moumou and Ms Loiseau were both held by the Court to be affected by Mr Pierre's misrepresentation about having to perform a medical examination.

Sentencing

- 12.10 Two aspects of section 130 of the *Penal Code* deal with sentencing.
- 12.11 Section 130(1) deals with minimum, maximum and second offence penalties for sexual assault in a range of circumstances:
- (1) A person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years:
- Provided that where the victim of such assault is under the age of 15 years and the accused is of or above the age of 18 years and such assault falls under subsection (2)(c) or (d), the person shall be liable to imprisonment for a term not less than 14 years and not more than 20 years:
- Provided also that if the person is convicted of a similar offence within a period of 10 years from the date of the first conviction the person shall be liable to imprisonment for a period not less than 28 years:
- Provided further that where it is the second or a subsequent conviction of the person for an assault referred to in subsection (2)(d) on a victim under 15 years within a period of ten years from the date of the conviction, the person shall be liable to imprisonment for life.
- 12.12 Section 130(4) lists matters that are to be considered by the court in determining the sentence to be imposed:
- (4) In determining the sentence of a person convicted of an offence under this section the court shall take into account, among other things-
- (a) whether the person used or threatened to use violence in the course of or for the purpose or committing the offence;
- (b) whether there has been any penetration in terms of subsection (2)(d); or
- (c) any other aggravating circumstances.
- 12.13 These provisions are silent on the specific issues identified in the good practice criteria—targeting of attributes, imbalance of power, and circumstantial vulnerability—but do not preclude consideration of these factors under section 130(4)(a) and/or (c). For example, in the recent Supreme Court case of *R v D R*,²³³ the court considered as the main ‘aggravating factor’ that the offender was ‘a person of authority over the victim’, being the victim’s father, and ‘abused that authority’ by sexually assaulting her.
- 12.14 In another recent case, *D L v R*,²³⁴ the Seychelles Supreme Court considered an appeal against sentence for sexual assault. Again, the Court considered aggravating factors, including threats made by the defendant to the child victim. The aggravating factors the Court identified included that:
- ‘the sexual assault [...] was repetitive in nature’;
 - ‘the victim was threatened with being put on fire and the house burnt, if she did not consent;’²³⁵ and
 - the offender was in a position of trust vis á vis the child victim.²³⁶

In this decision, the Supreme Court also considered sentencing decisions in a range of other sexual assault cases,²³⁷ and found that, in all the circumstances, the sentence of 10 years' imprisonment was not 'harsh and excessive'.

- 12.15 The decision in *R v Pierre* indicates a situation in which it could be argued that aggravating circumstances existed, particularly in relation to Mr Moumou, being a person known by the offender to have a disability and having reported a sexual assault. The sentencing judgment is not available, however.

Rules of evidence and procedure

- 12.16 There is nothing in the *Criminal Procedure Code* that provides for special evidentiary or procedural rules, or for inclusive practices to help people with disability to give evidence, including forms of communication, provision of intermediaries, etc. As such, Seychelles does not achieve the relevant good practice criteria on procedure.
- 12.17 It is relevant to note that the decision in *R v Pierre*²³⁸ refers to corroboration in relation to sexual offences, with the earlier decision referring to the need for the court to 'warn' itself of relying on uncorroborated evidence in sexual assault cases. This requirement is inconsistent with the general good practice criteria identified for rape/sexual assault laws set out in Part A, above.

FIGURE 26: Checklist for Seychelles' disability and sexual offences laws

<div>Checklist for Seychelles' laws dealing with disability and sexual offences</div> <div>These criteria are the same as those listed for sexual offences and people with disability in Part A of this report</div> <div>● Yes ● Partly ● No ● Unknown</div>	
1. Equality and non-discrimination	
a. General criteria apply: All of the criteria identified in this report for good practice laws in relation to rape/sexual assault also apply here. The following principles are additional principles or applications of those criteria to the situation of disabled people.	●
b. Disability-neutral: Sexual offences provisions should be disability-neutral. Any person, regardless of whether or not they have disability, may become the victim of rape or sexual assault. The definition should not exclude or target any potential victim/survivor.	●
c. No special offences: There should be no criminalising of conduct on the basis that one or more of the participants in sexual conduct is a person with disability.	●

Checklist for Seychelles' laws dealing with disability and sexual offences

These criteria are the same as those listed for sexual offences and people with disability in Part A of this report

● Yes ● Partly ● No ● Unknown

2. Dignity and respect

Respectful language: The definition of the crime and defences available, and laws dealing with sentencing, should not use language that devalues or is derogatory to people with disability.



Comment: Note, however, that the court in at least one reported case used language that is derogatory or which may stereotype people with disability, including 'mentally retarded person of weak intellect.'²³⁹

3. Rape and sexual assault is non-consensual

Comment: The Seychelles' Penal Code does not expressly include absence of consent as an element of the offence of sexual assault. It does, however, deal with consent within the provision (section 130(3)). There is also no definition of consent in the Penal Code, despite this term being used in a diverse range of contexts within the Code.

a. No criminalising of consensual sexual conduct: Absence of consent must be an element of rape/sexual assault. No consensual sexual activity between adults in private should be criminalised.



b. Submission is not consent: The law should make clear that passivity or submission by the victim/survivor does not equal consent. This is important in relation to people with disability because of the potential risks for people who have limited or no verbal communication, who have limited physical capacity to resist, who are heavily medicated, or who are under the care and/or control of the perpetrator.



Comment: The Seychelles' Penal Code provision dealing with consent is silent in relation to this element. The law could be strengthened by ensuring the consent provision is clear on this aspect.

c. Physical resistance not necessary: The law should expressly state that lack of evidence of physical resistance or lack of evidence of physical injury to the victim/survivor is not, by reason only of that fact, to be regarded as indicating consent to the act. This is important for the same reasons as 3(b), above.



Comment: The Seychelles' Penal Code provision dealing with consent is silent in relation to this element. The law could be strengthened by clarifying this in the provision.

Checklist for Seychelles' laws dealing with disability and sexual offences

These criteria are the same as those listed for sexual offences and people with disability in Part A of this report

● Yes ● Partly ● No ● Unknown

d. Reasonable steps to ascertain consent: The law should provide that an accused must have taken reasonable steps to determine if the other person consented to the sexual conduct. It should give examples of what 'reasonable steps' might include as guidance for the fact finder in a trial. This is particularly relevant to situations involving people who rely on non-verbal forms of communication.



Comment: *The Seychelles' Penal Code provision dealing with consent is silent in relation to this element. The law could be strengthened by clarifying this issue.*

e. Consent cannot be given: The law should give an inclusive list of circumstances in which consent cannot be given. In addition to the circumstances listed in the general criteria relating to rape/sexual assault, these should include circumstances where:

- there is no effective means of communication between the person and the perpetrator;
- the person submits because they are detained or institutionalised;
- the person submits because the perpetrator has control over them in either a physical, emotional, financial or legal sense;
- the person submits because they are in some way constrained including through use of chemical restraints, physical restraints, or due to limited mobility;
- the person submits because they are unable to escape including due to removal by the perpetrator of any device needed by the person for mobility or navigation;
- the person is asleep or unconscious, for example, due to coma.



Comment: *The Seychelles' Penal Code provision dealing with consent is silent in relation to this element. The law could be strengthened by adding this range of situations.*

4. Available defences

No defence relating to capacity or ignorance: The law should not allow defences to rape or sexual assault of education or charity, e.g., 'teaching' the person about sexual conduct.



Checklist for Seychelles' laws dealing with disability and sexual offences

These criteria are the same as those listed for sexual offences and people with disability in Part A of this report

● Yes ● Partly ● No ● Unknown

5. Rules of evidence and procedure

Comment: *The general good practice criteria that corroboration should not be required is absent in Seychelles, with the case law indicating courts must 'warn' themselves 'of the danger of acting without [corroboration of the evidence of the Complainant], in all cases of sexual offence.'*²⁴⁰

a. Rules of evidence in criminal proceedings for sexual offences involving people with disability should make clear that:

- | | |
|---|---|
| ▪ Special arrangements: courts must make special arrangements to ensure that the evidence of a person with disability can be given in the form in which they communicate. | ● |
| ▪ Form of communication: there must be no negative connotations for the credibility of a witness's testimony where it is given in the form in which they communicate; | ● |
| ▪ Jury guidance: judicial decision makers must provide guidance to jurors (where a jury is empanelled) about giving equal and non-discriminatory consideration to the testimony of witnesses affected by disability. | ● |

b. Rules of procedure: The rules of procedure should give a judge or magistrate hearing a charge of rape or another sexual offence a general power to order measures to protect the safety and wellbeing of the survivor, including, for example, to close the court to the public or to make orders allowing the survivor to:

Comment: *The Seychelles Criminal Procedure Code appears to be inconsistent with the Penal Code in relevant ways, including referring to 'rape' under the Penal Code in several places. The Penal Code does not use the term 'rape'. For example, the Procedure Code provides, in the Fourth Schedule, the 'forms of stating offences in information'. In relation to offences under section 130 of the Penal Code, the form is titled 'Rape' and states: 'A.B., on the day of, in the district of had carnal knowledge of E.F., without her consent.'*²⁴¹ *This form is inconsistent with the legislation in that it does not reflect the fact that the crime is 'sexual assault' and is gender-neutral. It should be updated.*

- | | |
|---|---|
| ▪ Form of questioning: be questioned in a manner that is appropriate to their capacity and circumstance; and | ● |
| ▪ Intermediary: have access to a trained intermediary throughout the criminal justice process, including in court. | ● |

Checklist for Seychelles' laws dealing with disability and sexual offences

These criteria are the same as those listed for sexual offences and people with disability in Part A of this report

● Yes ● Partly ● No ● Unknown

6. Appropriate penalties

Reflect targeted or exploitative circumstances: Penalties should reflect any findings that the victim was specifically targeted because of:	●
<ul style="list-style-type: none"> ▪ Attributes: their personal attributes, including disability; Comment: <i>The Seychelles' Penal Code provision dealing with sentencing provides for consideration of 'any other aggravating circumstances'.</i>	●
<ul style="list-style-type: none"> ▪ Power: the imbalance of power between the victim and the perpetrator; and Comment: <i>The Seychelles' Penal Code provision dealing with sentencing provides for consideration of whether violence was used or threatened.</i>	●
<ul style="list-style-type: none"> ▪ Circumstances: the circumstantial vulnerability of the victim, and factors that might interfere with their capacity to defend themselves or report the offence. Comment: <i>The Seychelles' Penal Code provision dealing with sentencing provides for consideration of 'any other aggravating circumstances'.</i>	●

- 225 *Seychelles Legal System* (undated) Bar Association of Seychelles <<https://sites.google.com/site/barassociationsc/seychelles-legal-system>> (last accessed March 2019).
- 226 *Chapter 38: The Penal Code 1955* (Seychelles) <https://greybook.seylii.org/w/se/CAP158#lfragment/zoupio-_Toc384202611/BQCwhgziBcwMYgK4DsDWszlQewE4BUBTAD-wBdoAvbRABwEtsBaAfX2zgGYAOAFgCYADHwBsARIEBKADTJspQhACKiQrgCe0AOSapE-OLmwAbQwGEkaaAEJkuwmFwJlqjdv2EAZTykAQhoBKAKIAMoEAagCCAHIimgVKkYABGOKT-sEhJAA> (last accessed March 2019).
- 227 The title of this chapter within the *Penal Code* is inconsistent with the good practice criteria for rape/sexual assault because it describes these offences as ‘offences against morality’ rather than offences of ‘power and violence’. The authors note that this chapter is within Division III of the *Penal Code*: ‘Offences Injuries to the Public in General’, and not within Division IV of the *Penal Code*, ‘Offences against the Person’, which includes the chapter on assault.
- 228 While the key provisions identified here are gender and disability-neutral, other offences in Chapter XV are not. The offence of ‘procurement’ applies only in relation to the procuring of girls or women (section 138); the offence of ‘procuring defilement by threats’ applies only in relation to the procuring of women or girls (section 139); the offence of ‘householder procuring defilement of girls under thirteen’ is clearly both age- and gender-specific (section 140); the offence of ‘detention of female in brothel or elsewhere’ is also clearly gender-specific (section 141); the offence of ‘conspiracy to defile’ applies only in relation to the defilement of women and girls (section 145).
- 229 *Criminal Procedure Code 1955* (Seychelles) <https://greybook.seylii.org/w/se/CAP54#lfragment/zoupio-_Toc410953454/BQCwhgziBcwMYgK4DsDWszlQewE-4BUBTADwBdoAvbRABwEtsBaAfX2zgBYBGABgE4ArAGYOAjgEoANMmylCEAlqJCuA-J7QA5BskQ4ubABsDAYSRpoAQmQ7CYXAiUr1Wm3YQBIPKQBC6gEoAogAyAQBqAllAcsYB-kqRgAEbQpOzi4kA> (last accessed March 2019).
- 230 *R v Pierre* [CO 71/2003] [2007] SCSC 134 (8 October 2007) <<https://seylii.org/sc/judgment/supreme-court/2007/134-0>> (last accessed March 2019).
- 231 Ibid.
- 232 Ibid 12.
- 233 *R v D R* [2018] SCSC 185 (22 February 2018) <<https://seylii.org/sc/judgment/supreme-court/2018/185-0>> (last accessed March 2019).
- 234 *D L v R* [2018] SCSC 263 (16 March 2018) <<https://seylii.org/sc/judgment/supreme-court/2018/263-0>> (last accessed March 2019).
- 235 Ibid [7] on 3.
- 236 Ibid [10] on 4.
- 237 Ibid [8] on 3.
- 238 Above n230.
- 239 Ibid.
- 240 Ibid 12.
- 241 *Criminal Procedure Code 1955* (Seychelles) sch 4, pt 4 [emphasis added] (last accessed March 2019).

13. Consensual same-sex sexual activity

The Pacific: Tasmania, Australia

Decriminalizing homosexuality is an essential first step towards establishing genuine equality before the law. But real, lasting progress cannot be achieved by changing laws alone. We must change minds as well. Like racism and misogyny, homophobia is a prejudice born of ignorance. And like other forms of prejudice, the most effective long-term response is information and education

Navanethem Pillay, UN High Commissioner for Human Rights²⁴²

Historical and cultural context

- 13.1 Tasmania was the Australian state with the grimmest history on LGBT+ equality. Same-sex sexual activity was a significant concern among the colonial administrators of the island's British convict system, with prisons such as the Separate Prison at Port Arthur built to reduce its incidence.²⁴³ The risk of same-sex sexual activity occurring in all-male and all-female convict populations was a significant reason behind anti-transportationists' advocacy against the convict system from the 1830s through to its cessation. This advocacy entrenched homophobic prejudice at the heart of the Australian national identity.²⁴⁴ It is perhaps no surprise, then, that Tasmania was the last jurisdiction in the British Empire to carry out capital punishment for sodomy, and the only jurisdiction in Australia to prohibit 'cross-dressing.' The association between same-sex sexual activity and 'the hated stain' of convictism has also been used to explain why the law was vigorously enforced in Tasmania, and why Tasmania was the last Australian jurisdiction to decriminalise same-sex sexual activity.²⁴⁵
- 13.2 This news report from a local newspaper, the *Launceston Examiner*, published in 1976, illustrates the devastating impact of the vigorous implementation of the law in the mid-20th century.²⁴⁶

FIGURE 27: The effects of criminalisation

Why Noel shot himself and Bert went to gaol

If there had been reform in 1958 I would have been saved from the worst period of my life. I was 21 and living in Launceston with another man of the same age. The police came to the house and asked who lived there. When we said we did, they asked where we slept and we pointed to the only bed in the house. We were taken to the police station, interviewed and charged with gross indecency. In the Supreme Court I pleaded guilty. I had no legal representation. The case was over in 10 minutes. I got three years.

Legal framework

- 13.3 In Tasmania, decriminalisation occurred in May 1997, ending a quarter century of efforts for decriminalisation across Australia, beginning in South Australia in 1973. Prior to May 1997, section 122 of the Tasmanian *Criminal Code* (in this section, the **Code**) stated:

Any person who

(a) has sexual intercourse with any person against the order of nature,

[...]

(c) consents to a male person having sexual intercourse with him or her against the order of nature,

is guilty of a crime.

Charge: Unnatural sexual intercourse.

- 13.4 Section 123 of the *Code* further provided:

Any male person who, whether in public or private, commits any indecent assault upon, or other acts of gross indecency with, another male person, or procures another male person to commit any act of gross indecency upon himself or any other male person, is guilty of a crime.

- 13.5 The effect of these laws was to criminalise all sexual activity between men, including all sexual activity between consenting, adult men in private. In the absence of a maximum penalty specific to these sections of the *Code*, the maximum sentence was 21 years imprisonment. As indicated from Noel's story above, shorter prison terms were applied by the 1950s. Into the 1960s and 1970s, fines were more common.

Reform process

- 13.6 It took seven attempts in the Parliament, and nearly 20 years, to achieve decriminalisation in Tasmania. The beginning of the formal process can be traced to 1976, when Dr Bob Brown, a prominent environmental activist and political figure, publicly declared his sexual orientation and called for decriminalisation.²⁴⁷ This was followed, in 1978, by a parliamentary committee recommendation for decriminalisation as part of an inquiry into victimless crimes in the State.²⁴⁸ Soon after, in 1979, the Tasmanian Homosexual Law Reform Group was formed in Tasmania's second city, Launceston, to advocate for reform. The first attempt at decriminalisation was made by a member of the governing Labor party at the time, John Green MP. Unfortunately, the Government did not bring the Bill to a vote.
- 13.7 In 1988, a renewed push for reform saw the Tasmanian Gay Law Reform Group formed in Hobart. The arrest of advocates at Hobart's Salamanca Market projected decriminalisation to greater prominence than ever before. In 1990, a new Tasmanian Government with a commitment to decriminalisation included the reform within a broader HIV/AIDS Preventative Measures Bill. The intention was to make decriminalisation more palatable to the state's traditionally conservative Upper House—the Legislative Council—by framing it as an urgent public health issue. Advocates opposed the strategy, arguing that decriminalisation should be presented in a human rights context, and that submerging it in a broader public health package would fail. They were proved right. The Legislative Council overwhelmingly voted against the decriminalisation part of the Bill.
- 13.8 It is impossible to understand this legislative history without understanding the strong community campaigns that were being run both for and against decriminalisation at the same time as debate was taking place in Parliament. For example, advocates for reform actively sought to educate the public. The emphasis was on telling personal stories about the damage done by the laws criminalising same-sex sexual activity, and the prejudice and stigma those laws perpetuated.
- 13.9 As well as this continuing community education, there was further activity in the Tasmanian Parliament, with decriminalisation legislation being introduced six more times in one or other chamber before reform was finally achieved. Each time, support for reform rose slightly and hostility decreased.
- 13.10 However, decriminalisation also went from the local to the international stage. At the end of 1991, Australia acceded to the *First Optional Protocol* to the ICCPR, allowing individual Australians to make complaints about infringement of their human rights by the state to the UN Human Rights Committee. The first communication from Australia was from a Tasmanian gay man, Nicholas Toonen.²⁴⁹ Toonen claimed the Tasmanian laws breached his right to privacy (Article 17), to equality (Article 26), and to non-discrimination in relation to those rights (Article 2(1)). Toonen also argued that his was a valid (admissible) complaint because the law had an adverse impact by fostering stigma and blocking better public policy.

- 13.11 The Tasmanian Government opposed the complaint, and argued that criminalisation was necessary to protect public health and morality, that it was impossible for laws enacted democratically to be an ‘unlawful’ interference with privacy, and that the laws were not enforced.²⁵⁰
- 13.12 In early 1994, the Human Rights Committee unanimously decided that the Tasmanian law had violated Toonen’s right to privacy under Article 17(1).²⁵¹ It dismissed the Tasmanian Government’s argument about lack of enforcement of sections 122 and 123 of the Code. The Committee said:
- The continued existence of the challenged provisions [...] continuously and directly ‘interfere[d]’ with the author’s privacy.²⁵²
- 13.13 It also noted, for the first time, that the rights to equality and protection from discrimination on the ground of ‘sex’ under Articles 2(1) and 26 of the ICCPR include ‘sexual orientation.’²⁵³ The Committee dismissed the Tasmanian Government’s submissions that the maintenance of the provisions was justified on public health and morality grounds.²⁵⁴ The Committee determined that, since it had found Toonen’s rights under Article 17(1) in relation to ‘sex’ under Article 2(1) had been violated, it did not need to consider whether Article 26 had also been violated.²⁵⁵
- 13.14 The Australian Government’s response to the Committee’s decision was to introduce the Human Rights (Sexual Conduct) Bill 1994, which passed Federal Parliament late that year. By entrenching the right to sexual privacy in federal law, the *Human Rights (Sexual Conduct) Act 1994* provided a defence should the Tasmanian Police pursue convictions under the offending Tasmanian provisions. However, this was not sufficient for advocates of decriminalisation. The federal law prohibited arbitrary interference with privacy, but failed to define what arbitrary interference might be.
- 13.15 In 1995, gay advocates lodged a case in the Australian High Court, asking the Court to find that the Tasmanian and Australian Federal laws were inconsistent, and that, therefore, under section 109 of the *Australian Constitution*, the Tasmanian laws were invalid.²⁵⁶ A High Court decision against the Tasmanian laws seemed inevitable. However, in 1997, before the High Court hearings had concluded, the Tasmanian Government allowed a conscience vote for MPs on decriminalisation. This paved the way for Tasmania’s Parliament to pass the reforms, which it did in 1997.²⁵⁷
- 13.16 Unlike decriminalisation in the other Australian states and territories, Tasmania fully decriminalised. It did not introduce a higher age of consent for same-sex sexual activity, provisions prohibiting the so-called ‘promotion and encouragement’ of homosexuality, or other discriminatory laws. Many such provisions were proposed in the state Upper House, but were defeated.

FIGURE 28: Decriminalisation in Tasmania

1976

Dr Bob Brown, a prominent environmental activist and political figure, publicly declared his sexual orientation and called for decriminalisation.

1978

A parliamentary committee recommendation for decriminalisation as part of an inquiry into victimless crimes in the State.

1979

The Tasmanian Homosexual Law Reform Group was formed in Tasmania's second city, Launceston, to advocate for reform.

1988

In 1988, a renewed push for reform saw the Tasmanian Gay Law Reform Group formed in Hobart.

1990

A new Tasmanian Government with a commitment to decriminalisation included the reform within a broader HIV/AIDS Preventative Measures Bill.

1991

Australia acceded to the *First Optional Protocol* to the ICCPR, allowing individual Australians to make complaints about infringement of their human rights by the state to the UN Human Rights Committee.

1994

In early 1994, the Human Rights Committee unanimously decided that the Tasmanian law had violated Toonen's right to privacy under Article 17(1).

The Australian Government's response to the Committee's decision was to introduce the Human Rights (Sexual Conduct) Bill 1994, which passed Federal Parliament late that year.

1995

Gay advocates lodged a case in the Australian High Court, asking the Court to find that the Tasmanian and Australian Federal laws were inconsistent, and that, therefore, under section 109 of the Australian *Constitution*, the Tasmanian laws were invalid.

The impact of reform

- 13.17 Decriminalisation had several immediate positive impacts in Tasmania, for example:
- There was an immediate cessation of the anti-gay hate and fear campaigns.
 - Public policy reversed, with the establishment of formal government LGBT+ policy committees in areas such as education, health and policing within a few months.
 - There was follow-up law reform activity; the Tasmanian *Anti-Discrimination Act* was passed in 1998, which, among other characteristics, prohibited discrimination on the basis of sexual orientation.
- 13.18 These and a number of subsequent reforms²⁵⁸ occurred because of a shift in public attitudes. Thanks to an intense community education campaign, support for decriminalisation went from 30% in 1988—well below the national average—to over 60% in 1997 (above the national average).

*Tasmania went from having Australia's worst laws, policies and attitudes on LGBT+ people to having the best.*²⁵⁹

Legislative framework

- 13.19 Tasmania's law relating to sexual offences and same-sex sexual activity meet all the criteria for good practice laws on consensual same-sex sexual activity outlined in Part A of this report. Sex between consenting adults in private is not a criminal offence. The age of consent is the same for same-sex and heterosexual sexual activity. There are no other sexual offences laws applied only or disproportionately against LGBT+ people or same-sex sexual activity. The current law on age of consent states:

Criminal Code Act 1924, s 124

Sexual intercourse with young person

- (1) Any person who has unlawful sexual intercourse with another person who is under the age of 17 years is guilty of a crime.

Charge: Sexual intercourse with a young person under the age of 17 years.

Lessons from Tasmania

- 13.20 From the decriminalisation of same-sex sexual activity in Tasmania, and the broader transformation that accompanied it, we can draw several key lessons:
- Legislative activity, judicial appeals and community education can go hand-in-hand to create an atmosphere supportive of reform.
 - Debating decriminalisation discretely as a human rights reform can have a positive impact on progressing a range of related reforms.

- Submersion of decriminalisation in a broader legislative package, or incremental legislative steps to reform, are not the only ways to achieve change within a hostile political environment. This is especially the case if there are alternative paths to reform, including test cases, UN communications, and different levels of government to which to appeal for support.

FIGURE 29: Checklist for Tasmania’s laws on consensual same-sex sexual activity

<p>Checklist for Tasmania’s laws on consensual same-sex sexual activity</p> <p><i>These criteria are the same as those listed for consensual same-sex sexual activity in Part A of this report</i></p> <p>● Yes ● Partly ● No ● Unknown</p>	
1. Equality and non-discrimination	
<p>a. No laws criminalising same-sex sexual activity: Consensual same-sex sexual activity in private should not be criminalised. This includes ensuring that the following offences, however described, are no longer criminalised when in private, whether through statute or common law:</p> <ul style="list-style-type: none"> ▪ indecency between people of the same sex; ▪ carnal knowledge/intercourse against the order of nature; ▪ buggery; ▪ sodomy; ▪ homosexuality; ▪ lesbianism; ▪ same-sex sexual relations; and ▪ fellatio or cunnilingus. 	●
<p>b. No other discriminatory sexual offences laws: There should be no other sexual offences laws that discriminate on the ground of sexual orientation. These laws include, but are not limited to:</p> <ul style="list-style-type: none"> ▪ age of consent laws that set different ages for consensual same-sex and heterosexual sexual activity, or for sexual acts that are particularly associated with either group; ▪ laws that restrict or prohibit so-called ‘promotion’ of homosexuality, such as information on HIV/AIDS, sexual education, support for LGBT+ people or law reform campaigns; and ▪ any other public morality laws used to indirectly criminalise same-sex sexual activity, such as loitering, debauchery and vagrancy laws. 	●

Checklist for Tasmania's laws on consensual same-sex sexual activity

These criteria are the same as those listed for consensual same-sex sexual activity in Part A of this report

● Yes ● Partly ● No ● Unknown

c. Non-discriminatory implementation and policing:

Laws that are neutral on their face, including sexual offences, must not be implemented or enforced in a discriminatory way by disproportionately and negatively affecting LGBT+ people. Such laws must not be used to criminalise or stigmatise LGBT+ people.



2. Dignity and respect

No derogatory language in the law: There should be no language, terminology or framing in sexual offences provisions that is derogatory, offensive or stigmatising to LGBT+ people. For example:

- 'buggery', 'sodomy', 'intercourse against the order of nature', 'indecency between male/female persons', and 'abominable crime';
- conflating same-sex sexual activity with bestiality.



3. In Commonwealth nations that have decriminalised through court decision and not through reform of legislation, the following additional criteria apply

Respect the decision: Government respects and enforces the decision. In particular:

- **No arrests:** There should be no further arrests, prosecutions or convictions for same-sex sexual activity between consenting adults in private as inconsistent with the court decision.
- **Legislative reform:** Government should remove any legislative provisions that were struck down by the court for criminalising consensual same-sex sexual activity.

N/A

- 242 Cited in *Laws criminalizing homosexuality are incompatible with international human rights standards and fuel homophobia* (10 March 2011) United Nations Human Rights <<https://www.ohchr.org/EN/NewsEvents/Pages/Homophobia.aspx>> (last accessed March 2019).
- 243 Rodney Croome, 'Homosexuality', *The Companion to Tasmanian History* (University of Tasmania, Hobart, 2006) <http://www.utas.edu.au/library/companion_to_tasmanian_history/H/Homosexuality.htm> (last accessed March 2019).
- 244 Robert Hughes, *The Fatal Shore* (Alfred A Knopf, USA, 1988).
- 245 Babette Smith, *Australia's Birthstain, The startling legacy of the convict era* (Allen & Unwin, Sydney, 2009).
- 246 Croome, above n243.
- 247 At the time, Dr Brown was an environmental activist and member of the United Tasmania group, Australia's first 'green' party.
- 248 House of Assembly Select Committee on Victimless Crimes, Parliament of Tasmania, *Victimless Crime: Report of Select Committee of the House of Assembly*, with minutes of proceedings (1978).
- 249 Nicolas Toonen, 'Communication No. 488/1992', Communication to the UN Human Rights Committee in *Toonen v Australia*, 25 December 1991 (No. 488/1992).
- 250 The Australian Federal Government also made submissions to the HRC.
- 251 Human Rights Committee, *Views: Communication No. 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [8.6] (**Toonen**), available in Office of the United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights: Selected Decisions of the Human Rights Committee under the Optional Protocol* (vol 5, 47th to 55th sessions, Geneva, 2005, UN Doc CCPR/C/OP/5) 133–140, 139 <<https://www.ohchr.org/Documents/Publications/SDecisionsVol5en.pdf>>.
- 252 Ibid 139 [8.2].
- 253 Ibid 139 [8.7].
- 254 Ibid 139 [8.4]–[8.6].
- 255 Ibid 140 [11].
- 256 *Croome v Tasmania* [1997] HCA 5; (1997) 191 CLR 1991 (26 February 1997) <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1997/5.html>>.
- 257 *Criminal Code Amendment Act 1997* (Tas) (No. 12 of 1997) ss 4 & 5.
- 258 Subsequent reforms in Tasmania not considered here included: repeal of male cross-dressing offence (2001); recognition of same-sex and other significant personal relationships (2003); granting parenting equality to same-sex couples (2003); same-sex marriage (2005, subsequently overturned by Federal Parliament); recognition of overseas same-sex marriages; expungement of historical LGBT+ criminal records (2017); legal recognition of the gender identity of transgender and gender diverse people (2019).
- 259 Rodney Croome, LGBT+ rights activist and former National Director, Australian Marriage Equality.

Asia: India

India's law criminalising same-sex sexual activity

13.21 Section 377 of the Indian *Penal Code* states:

Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

13.22 However, the Indian Supreme Court found this section to be unconstitutional in 2018 and struck it down.²⁶⁰ The Supreme Court decision set a new, global standard for judicial decisions regarding the decriminalisation of same-sex sexual activity. The movement for judicial review of section 377 also set high standards. Section 377 remains on the statute books, but it cannot lawfully be applied as the provision is now null and void.

13.23 Section 377 was enacted in 1864, following the enactment of a similar law in the United Kingdom in 1860.²⁶¹ Section 377 has been interpreted to criminalise all forms of sexual intercourse other than heterosexual penile/vaginal intercourse. This includes anal and oral intercourse, regardless of the sex of the partners, as well as intercourse with an animal. In effect, all forms of intercourse between men were prohibited, and the law was historically enforced against male partners having sex. Sex between women was not prohibited. The provision criminalises sexual activity regardless of whether it is consenting, takes place in private, or the partners are adults.

13.24 The *Penal Code* does not include a provision criminalising indecency between men. Such a provision was enacted in the UK in 1885, and later in other British colonies in the Pacific, Africa and North America.

13.25 In recent decades, section 377 has not been used to prosecute same-sex sexual activity between consenting adults in private. However, it has been used 'to threaten, coerce, extort, and to disrupt HIV work.'²⁶² Convictions under section 377 have been for sex involving children.²⁶³ In 2012, the *Protection of Children from Sexual Offences Act* came into effect. It is gender-neutral and includes sexual offences between adult men and boys.²⁶⁴

Historical and cultural context

13.26 It is difficult to generalise about the historic attitudes and laws regarding same-sex sexual activity across such a large and diverse country as India. What we can say is that, at some times and in some places, same-sex sexual activity and gender variance were not actively persecuted and were even condoned. Some traditional Hindu texts, including the Mahabharata and Puranas, attest to this tolerance of same-sex relationships and sexual activity.²⁶⁵

- 13.27 After the rebellion of 1857, British power in India was transferred from the East India Company to the Crown, with administration consolidated in the UK India Office. Part of this consolidation was the enactment of the Indian *Penal Code* in 1864, which included section 377. Section 377 was modelled on section 61 of the *Offences Against the Person Act 1861* (UK). The *Penal Code* did not, as a matter of course, apply in many princely states until the mid-20th century.²⁶⁶
- 13.28 In India, advocacy in favour of decriminalising same-sex sexual activity dates back at least to the early 1990s,²⁶⁷ but it was not until 2001 that action to overturn section 377 shifted to the courts. It began with a case brought by the Indian sexual health and HIV prevention NGO, the Naz Foundation, in the Delhi High Court. The High Court initially refused the application because the litigants had not been prosecuted under section 377. However, the Supreme Court overturned this decision and the case went ahead in the Delhi High Court.²⁶⁸ The case was joined by a number of other NGOs including Voices Against 377 and the Lawyers Collective.
- 13.29 In July 2009, the Delhi High Court handed down its judgment in *Naz Foundation v Govt of NCT of Delhi* (the **Naz Foundation case**). It found that section 377, insofar as it criminalised consensual sex between adults in private, violated provisions of the Indian Constitution, including: article 14, the right to equality; article 15, a prohibition on discrimination; and article 21, the right to life, liberty and security of person. The two-judge decision placed equality for lesbian, gay, bisexual and transgender people firmly within India's national story of freedom, equality and inclusion:
- Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately. In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.²⁶⁹
- 13.30 In December 2013, the Indian Supreme Court ruling in the case of *Suresh Kumar Koushal v Naz Foundation*²⁷⁰ (the **Koushal case**) set aside the 2009 decision in the *Naz Foundation* case, effectively re-criminalising same-sex sexual activity. That decision was protested around the world, including by the then UN High Commissioner for Human Rights, Navanethem Pillay.

[...] criminalising private, consenting same-sex sexual conduct violates the rights to privacy and to non-discrimination enshrined in the International Covenant on Civil and Political Rights, which India has ratified. Yesterday's Supreme Court decision in this case represents a significant step backwards for India and a blow for human rights.

Navanethem Pillay, UN High Commissioner for Human Rights²⁷¹

13.31 A Supreme Court decision in August 2017 upholding the right to privacy as a fundamental right gave advocates hope that the *Koushal* case could be set aside. In January 2018, a petition was lodged in the Supreme Court by gay rights advocate and choreographer Navtej Singh Johar calling for the *Koushal* case to be reconsidered. In May, more petitions were filed from a wide variety of people, including Arif Jafar, a Lucknow-based LGBT+ activist who had previously been arrested under section 377.

13.32 In September 2018, the Court delivered a unanimous decision that decriminalised same-sex sexual activity.²⁷² In particular, the decision:

- overturned the *Koushal* case;
- confirmed that section 377 violated articles 14, 15 and 21 of the Indian *Constitution*;
- overturned section 377 insofar as it criminalised sex between consenting adults in private;
- found that rights in the Indian *Constitution* apply equally to LGBT+ people, including equal citizenship and protection under the law; and
- dismissed traditional misconceptions about sexual orientation and explicitly affirmed the dignity of LGBT+ people:

Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression.²⁷³

13.33 The Court's decision was hailed around the world for its humanity, as well as for decriminalising same-sex sexual activity. According to Chief Justice Dipak Misra:

We have to bid adieu to the perceptions, stereotypes and prejudices deeply ingrained in the societal mindset so as to usher in inclusivity in all spheres and empower all citizens alike without any kind of alienation and discrimination.²⁷⁴

We must realize that different hues and colours together make the painting of humanity beautiful and this beauty is the essence of humanity. We need to respect the strength of our diversity so as to sustain our unity as a cohesive unit of free citizens by fostering tolerance and respect for each other's rights thereby progressing towards harmonious and peaceful co-existence in the supreme bond of humanity.²⁷⁵

Community involvement and its impact on the outcome

13.34 An important element of these judicial processes was the degree to which they became a focus for community organising. Vivek Divan is an Indian lawyer and community organiser who was involved in the *Naz Foundation* case and subsequent litigation. He has written about criticism of the *Naz Foundation* case 'for not having consulted with the wider community before filing, for apparently

pegging the case on HIV and framing some of the arguments and language in problematic terms'. This criticism led, in turn, to a series of community meetings involving LGBT+ people from across India.

13.35 Divan writes:²⁷⁶

These meetings were an occasion for the queer community to develop consensus, debate and discuss on the effect of law, its role in people's lives, strategies to engage with it in and outside the courtroom, to be educated about otherwise arcane judicial processes, and the risks and benefits of taking particular steps to advance the case.²⁷⁷

There was brainstorming to identify historians and mental health experts in support of the case. Discussions also honed the nuances conveyed by arguing lawyers in explaining queer marginalization and oppression to judges. Calibrating if and how to force the hand of the health ministry to articulate the hindrance posed by S377 to HIV prevention efforts also took place in these discussions.

It was this process that led to queer people approaching the court to articulate the corrosive impact of Section 377 on their lives. They did so openly through affidavits filed in their own names. This coming forward by queer people happened not in 2016, as has been portrayed recently, but way back in the Delhi high court. The victory of September 2018 is as much a tribute to all these brave trailblazers as it is to anyone else.²⁷⁸

- 13.36 This high level of community involvement and ownership clearly had an important impact on the success of the Indian judicial campaign. It gave LGBT+ Indians a greater sense of ownership over the judicial campaign, helping them endure the first Supreme Court setback. It led to involvement from the Lawyers Collective, Voices Against 377, and a diversity of litigants who would carry the campaign forward to its conclusion in 2018. Not least, it provided the judicial campaign with greater intellectual and strategic depth, and far more evidence of diverse human experience. This led, in turn, to the strength and humanity evident in the final decision.

Impact of the Indian decision

- 13.37 Divan has identified impacts from the 2018 Supreme Court decision, including the following:

[On section 377:] Section 377 is seen as a dead letter as it applies to consenting sex between adults. In so far as it covers non-consenting sex it still remains (sexual assault law in India is gender-specific, and envisages only women survivors and men as perpetrators).

[On blackmail:] In urban contexts (e.g. Mumbai and Delhi) online blackmail of men (through hook-up apps/websites) has considerably decreased. Interestingly, this also happened when we were first decriminalized in 2009 by the Delhi High Court.

[On police harassment:] Kerala police have issued internal directives to cease harassment of trans people (this is definitely a one-off – much, much work needs to be done with the vast majority of phobic cops, healthcare workers etc.)

[On personal autonomy:] Many queer women – individuals and couples – are asserting themselves post-decriminalization. This has led to backlash within the family (violence, banishment/ostracization etc.) but is also revealing an increasing determination to approach the courts seeking injunctions from interference in their same-sex relationship by their families. And, courts have been affirming the legitimacy of queer relationships with heartening frequency in some of these cases.²⁷⁹

[On further court actions:] Other positive instances have been reported – a case filed against someone for derogatory comments against the LGBTQ community, [and] a court summons to a doctor providing ‘conversion therapy.’²⁸⁰

- 13.38 Divan notes violence against transgender people is an area where the Supreme Court decision does not seem to have had a positive impact:

Violence against transgender people (especially trans women, such as hijras) has not decreased. Initially, there was a sense that it had spiked soon after the S377 judgment (I cannot confirm this but heard murmurings of it on some discussion groups). Hijras lead very public lives in India and trans people have had a powerful rights-affirming judgment from the Supreme Court in 2014. Yet, the judgment directives have just not been implemented (an atrocious transgender law was fortunately stalled from passing in Parliament recently), and they continue to face public violence, with the police refusing to acknowledge their equal and decriminalised citizenship. I’m not sure if any increase in violence can be ascribed to the S377 judgment (as backlash, perhaps), but it doesn’t seem to have had the positive effect of reducing violence.

FIGURE 30: Checklist for India’s laws on consensual same-sex sexual activity

<div>Checklist for India’s laws on consensual same-sex sexual activity</div> <div>These criteria are the same as those listed for consensual same-sex sexual activity in Part A of this report</div> <div>● Yes ● Partly ● No ● Unknown</div>	
1. Equality and non-discrimination	
<div>a. No laws criminalising same-sex sexual activity: Consensual same-sex sexual activity in private should not be criminalised. This includes ensuring the following offences, however described, are no longer criminalised when in private, whether through statute or common law:</div> <div><div><div>▪ indecency between people of the same sex;</div><div>▪ carnal knowledge/intercourse against the order of nature;</div><div>▪ buggery;</div><div>▪ sodomy;</div><div>▪ homosexuality;</div><div>▪ lesbianism;</div><div>▪ same-sex sexual relations; and</div><div>▪ fellatio or cunnilingus.</div></div></div>	●
<div>b. No other discriminatory sexual offences laws: There should be no other sexual offences laws that discriminate on the ground of sexual orientation. These laws include, but are not limited to:</div> <div><div><div>▪ age of consent laws that set different ages for consensual same-sex and heterosexual sexual activity, or for sexual acts that are particularly associated with either group;</div><div>▪ laws that restrict or prohibit so-called ‘promotion’ of homosexuality, such as information on HIV/AIDS, sexual education, support for LGBT+ people, or law reform campaigns; and</div><div>▪ any other public morality laws used to indirectly criminalise same-sex sexual activity, such as loitering, debauchery and vagrancy laws.</div></div></div>	●
<div>c. Non-discriminatory implementation and policing: Laws that are neutral on their face, including sexual offences, must not be implemented or enforced in a discriminatory way by disproportionately and negatively affecting LGBT+ people. Such laws must not be used to criminalise or stigmatise LGBT+ people.</div>	●

Checklist for India's laws on consensual same-sex sexual activity

These criteria are the same as those listed for consensual same-sex sexual activity in Part A of this report

● Yes ● Partly ● No ● Unknown

2. Dignity and respect

No derogatory language in the law: There should be no language, terminology or framing in sexual offences provisions that is derogatory, offensive or stigmatising to LGBT+ people. For example:

- 'buggery', 'sodomy', 'intercourse against the order of nature', 'indecency between male/female persons' and 'abominable crime';
- conflating same-sex sexual activity with bestiality.



3. In Commonwealth nations that have decriminalised through court decision and not through reform of legislation, the following additional criteria apply

Respect the decision: Government respects and enforces the decision. In particular:

- **No arrests:** There should be no further arrests, prosecutions or convictions for same-sex sexual activity between consenting adults in private as inconsistent with the court decision;
- **Legislative reform:** Government should remove any legislative provisions that were struck down by the court for criminalising consensual same-sex sexual activity.



- 260 *Navtej Singh Johar v Union of Indian Ministry of Land and Justice Secretary* [2018] INSC 746 (6 September 2018) <<http://www.liiofindia.org/in/cases/cen/INSC/2018/746.html>> (last accessed March 2019).
- 261 *Offences against the Person Act 1861* (UK) s 61.
- 262 Email interview on file with the authors.
- 263 Ibid.
- 264 Ibid.
- 265 Ibid.
- 266 *Indian Penal Code* [2019] Wikipedia <https://en.wikipedia.org/wiki/Indian_Penal_Code> (last accessed March 2019).
- 267 Vimal Balasubrahmanyam, 'Gay Rights in India' (1996) 31(5) *Economic & Political Weekly* 257 <<https://www.epw.in/journal/1996/5/commentary/gay-rights-india.html>> (last accessed March 2019).
- 268 Sheela Bhatt, *Gays rights is matter of public interest: SC* (3 February 2006) Rediff <<http://us.rediff.com/news/2006/feb/03gay.htm?q=tp&file=.htm>> (last accessed March 2019).
- 269 *Naz Foundation v Government of NCT of Delhi and Others – CW 7455/2001* [2009] INDLHC 2450 (2 July 2009) <<http://www.liiofindia.org/in/cases/dl/INDLHC/2009/2450.html>> (last accessed March 2019).
- 270 *Suresh Kumar Koushal & Anr v Naz Foundation & Ors* [2013] INSC 1096 (11 December 2013) <<http://www.liiofindia.org/in/cases/cen/INSC/2013/1096.html>> (last accessed March 2019).
- 271 'Pillay dismayed at re-imposition of criminal sanctions for same-sex relationships in India, Office of the High Commissioner for Human Rights' (Media Release, 12 December 2013) <<https://news-archive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14090&LangID=E>> (last accessed March 2019).
- 272 Above n260.
- 273 Ibid [253(vii)] on 160.
- 274 Ibid [3] on 3.
- 275 Ibid [250] on 154.
- 276 Vivek Divan, *On the verge of a kind of freedom: Ridding India of Section 377* (16 August 2018) ARC International <<http://arc-international.net/blog/on-the-verge-of-a-kind-of-freedom-ridding-india-of-section-377/>> (last accessed March 2019).
- 277 Ibid.
- 278 Vivek Divan, *Celebrating the Long Journey That Has Led to This Pride* (2018) The Wire <<https://thewire.in/lgbtqia/delhi-pride-parade-section-377>> (last accessed March 2019); Vivek Divan, *On the verge of a kind of freedom: Ridding India of Section 377* (16 August 2018) ARC International <<http://arc-international.net/blog/on-the-verge-of-a-kind-of-freedom-ridding-india-of-section-377/>> (last accessed March 2019).
- 279 'Delhi high court orders police protection for same sex couple' (*Hindustan Times*, New Delhi, 1 October 2018) <<https://www.hindustantimes.com/delhi-news/delhi-high-court-orders-police-protection-for-same-sex-couple/story-FOU7VYCWzEXlqTtubZ4PL.html>>; Ashok Kini, 'Choices Of Sexual Preference Protected Under The Scheme Of Constitutional Morality: Calcutta HC' (*LiveLaw.In*, 4 February 2019) <<https://www.livelaw.in/news-updates/same-sex-adult-cohabitation-not-illegal-142629>>; and 'Kerala high court lets lesbian couple live together' (*Times of India*, 25 September 2018) <<https://timesofindia.indiatimes.com/city/kochi/kerala-hc-lets-lesbian-couple-live-together/articleshow/65943234.cms>> (last accessed March 2019). The earlier comments are from correspondence with the authors during the research.
- 280 Kamaal R Khan booked for obscene comments against LGBTQ community (*The Indian Express*, Mumbai, 9 December 2018) <<https://indianexpress.com/article/india/kamaal-r-khan-booked-for-obscene-comments-against-lgbtq-community-5484837/>> (last accessed March 2019); *Delhi Doctor Charged ₹s 4,500 For "Treating" Gays, Gets Court Summon* (NDTV, Delhi, 8 December 2018) <<https://www.ndtv.com/delhi-news/delhi-doctor-gave-shock-therapy-to-homosexuals-summoned-by-court-1959695>> (last accessed March 2019).

Caribbean and the Americas: Belize

Belize's law criminalising same-sex sexual activity

13.39 Section 53 of the *Criminal Code*, updated to 2000, states:

53. Unnatural Crime

Every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years.²⁸¹

13.40 This section is in Part 2, 'Rape and like crime', but it was not updated when Belize reformed its rape laws in 2013. The title of the section is 'Unnatural crime', and the maximum penalty is 10 years' imprisonment.

13.41 The origin of section 53 is found in the colonial-era Belize *Criminal Code* of 1888. Section 65 of that Code criminalised 'unnatural carnal knowledge of any person, with force or without the consent of such person'. The requirements of force and non-consent were absent from the revised Belize *Criminal Code* of 1944. The 1944 provision was replicated at the time of Belizean independence from Britain in 1981.²⁸²

13.42 'Intercourse against the order of nature' criminalised anal and oral intercourse regardless of the gender of the partners. Arguably, it could have included other forms of sexual activity not involving a penis and vagina. Belize has never criminalised 'indecentry' between men, like many other former British colonies. However, the law stigmatised gay men. Sex between women was not made illegal in Belize, but the stigma section 53 attached to sex between men also stigmatised lesbians.

Impact of the law

13.43 British imperialism left Belize with a legacy of prejudice against LGBT+ people that is reinforced by section 53.

Although bounded on two sides by Latin American countries with more liberal attitudes toward same-sex relationships, Belize retains a culture more closely aligned with Caribbean countries whose perspectives were colored by 200 years of British occupation. There is an ethos of 'live and let live,' but only as long as the gay community remains invisible.

Julia Scott, *The New York Times*²⁸³

13.44 This legacy has had an impact on the LGBT+ community's capacity to organise:

The L.G.B.T. community in Belize, with the exception of a dedicated corps of organizers and supporters, remains timid, fractured and apolitical. Unibam [United Belize Advocacy Movement, a local NGO] itself has only 128 members, in part because of people's concern that their names could be made public.²⁸⁴

- 13.45 It has also affected the wellbeing of individual LGBT+ people. LGBT+ and youth advocate Kevin Mendez has described the Belizean law as ‘propelling’ discrimination against LGBT+ people.

Belize’s inherited draconian laws, and poorly supportive legal and social environments that are not inclusive of our LGBT rights, are propelling factors to the issues faced by our LGBT community. Verbal and physical abuse on the streets, family abandonment, teenage suicide, cases where justice is not served, youth sex work, sexual exploitation, HIV/AIDS, and little to no safe spaces are some of the many problems that Belize and Caribbean countries face.²⁸⁵

Court action against the Belizean law

- 13.46 In 2010, the United Belize Advocacy Movement (UniBAM), and its director, Caleb Orozco, jointly filed a case in the Belize Supreme Court against section 53. UniBAM’s standing as an applicant was struck down in 2012. It joined as an interested party, along with the International Commission of Jurists, the Commonwealth Lawyers Association, and the Human Dignity Trust. A number of church organisations joined as interested parties in support of the Belize Attorney-General.
- 13.47 While Orozco was the face of the case, there was a significant community movement behind it. In his words, ‘there were 100s of people debating on Facebook, championing on ADS, [and] speaking up with political power brokers.’²⁸⁶ The Belizean legal community was less involved. In Orozco’s words, ‘the legal community stayed in their corner.’²⁸⁷
- 13.48 Under section 20 of the Belize *Constitution*, any person may apply to the Supreme Court for redress if they believe their rights under the *Constitution* have been violated. Caleb Orozco and UniBAM argued that section 53 violated human rights protected under the *Constitution*, including the right to privacy (sections 3(c) and (d), and 14.1), equal protection of the law (section 6.1), freedom of expression (section 12), and freedom from discrimination (section 16.1). The case also alleged a violation of human dignity, which is ‘the fundamental right which underlies all other fundamental rights’ in the Belize *Constitution*.²⁸⁸
- 13.49 The Attorney General’s case focussed on ‘the people’s right through their elected officials to change the law.’²⁸⁹ Unfortunately, hearings in the case were accompanied by threats of violence and death against Orozco.²⁹⁰
- 13.50 In August 2016, Chief Justice Kenneth Benjamin found that section 53 violated Orozco’s constitutional rights to dignity, privacy, equality before the law, non-discrimination on grounds of sex, and freedom of expression, and could not be justified on the basis of ‘public morality.’ Section 53 was struck down to the extent that it criminalised consensual sex between adults in private.²⁹¹
- 13.51 This made Belize the first former British colony in the Caribbean to decriminalise same-sex sexual activity.

- 13.52 Following the *Orozco* decision, the Belize Government filed a partial appeal to the Court of Appeal. While accepting the result of decriminalisation, the partial appeal is against the finding that the prohibition on sex discrimination under the *Constitution* can be interpreted to prohibit discrimination on the basis of sexual orientation and that the right to freedom of expression was violated. Hearings were held in October 2018 but, at the time of writing, no decision had yet been handed down.

Impact of the decision

- 13.53 The obvious impact of the 2016 decision was the decriminalisation of private, consenting adult same-sex sexual activity, but there have been other positive flow-on effects as well.
- 13.54 In 2018, the Belize Government accepted 15 of the 17 recommendations regarding sexual orientation and gender identity made by the UN Human Rights Council in its Universal Periodic Review of Belize.²⁹² These included recommendations regarding protections from discrimination, violence and hate crime.
- 13.55 In an interview with the authors, Orozco identified a number of other flow-on effects:
- The 2016 ruling has led to the Foreign Minister instructing his technical people in 2018 to ask for international help to develop a National Human Rights Institution Recommendation that was tabled in the UPR in 2009.
- We are evolving into a strong Civil Rights organization that advances policy and advocacy providing technical support for our movement.
- LGBT-led or inclusive organizations looking at trans issues, health, lesbian and bi-sexual women, and family issues.
- Political currency developed where we just donate a security camera system to the northern branch of the police department and my name is used to defend the rights of sex workers and other marginalised women.
- 13.56 According to Orozco, there has been no increase in police harassment of LGBT+ people since the 2016 decision.
- 13.57 Summing up the positive changes in Belize, Orozco wrote:
- We have dared to set many firsts. The first country in CARICOM to decriminalize. The first and only country in the Commonwealth to implement a hybrid strategy to advance significant criminal code legislation. We were the first to co-sponsor an LGBT resolution at the Organization of American States (OAS).
- It's totally crazy to see the 180-degree turn in the state's SOGI position. I remain hopeful our country can continue in the right direction where the value of good governance adds to our development along with a greater quality of life for all.²⁹³
- 13.58 To some degree, this shift in Government policy may reflect a shift in public attitudes. While anti-LGBT+ sentiment was still rife in Belize, a survey released by UN AIDS in 2015 found Belizeans are more tolerant of homosexual people than people in other Caribbean nations.²⁹⁴

- 13.59 There have also been important international ramifications. The Belize Supreme Court decision set an important precedent in the region. In 2018, the High Court of Trinidad and Tobago ruled that its country's laws criminalising same-sex sexual activity were unconstitutional. The Belize case was cited by the High Court of Trinidad and Tobago in its judgment,²⁹⁵ along with similar decisions from other Commonwealth countries, including India and Australia.

FIGURE 31: Checklist for Belize's laws on consensual same-sex sexual activity

<p>Checklist for Belize's laws on consensual same-sex sexual activity</p> <p><i>These criteria are the same as those listed for consensual same-sex sexual activity in Part A of this report</i></p> <p>● Yes ● Partly ● No ● Unknown</p>	
1. Equality and non-discrimination	
<p>a. No laws criminalising same-sex sexual activity: Consensual same-sex sexual activity in private should not be criminalised. This includes ensuring the following offences, however described, are no longer criminalised when in private, whether through statute or common law:</p> <ul style="list-style-type: none"> ▪ indecency between people of the same sex; ▪ carnal knowledge/intercourse against the order of nature; ▪ buggery; ▪ sodomy; ▪ homosexuality; ▪ lesbianism; ▪ same-sex sexual relations; and ▪ fellatio or cunnilingus. 	●
<p>b. No other discriminatory sexual offences laws: There should be no other sexual offences laws that discriminate on the ground of sexual orientation. These laws include, but are not limited to:</p> <ul style="list-style-type: none"> ▪ age of consent laws that set different ages for consensual same-sex and heterosexual sexual activity, or for sexual acts that are particularly associated with either group; ▪ laws that restrict or prohibit so-called 'promotion' of homosexuality, such as information on HIV/AIDS, sexual education, support for LGBT+ people, or law reform campaigns; and ▪ any other public morality laws used to indirectly criminalise same-sex sexual activity, such as loitering, debauchery and vagrancy laws. 	●

Checklist for Belize's laws on consensual same-sex sexual activity

These criteria are the same as those listed for consensual same-sex sexual activity in Part A of this report

● Yes ● Partly ● No ● Unknown

c. Non-discriminatory implementation and policing:

Laws that are neutral on their face, including sexual offences, must not be implemented or enforced in a discriminatory way by disproportionately and negatively affecting LGBT+ people. Such laws must not be used to criminalise or stigmatise LGBT+ people.



2. Dignity and respect

No derogatory language in the law: There should be no language, terminology or framing in sexual offences provisions that is derogatory, offensive or stigmatising to LGBT+ people. For example:

- 'buggery', 'sodomy', 'intercourse against the order of nature', 'indecentcy between male/female persons' and 'abominable crime';
- connotations of same-sex sexual activity with bestiality.



3. In Commonwealth nations that have decriminalised through court decision and not through reform of legislation, the following additional criteria apply

Respect the decision: Government respects and enforces the decision. In particular:

- **No arrests:** There should be no further arrests, prosecutions or convictions for same-sex sexual activity between consenting adults in private as inconsistent with the court decision.
- **Legislative reform:** Government should remove any legislative provisions that were struck down by the court for criminalising consensual same-sex sexual activity.



- 281 *Criminal Code (CAP 101)* (Belize) <https://www.oas.org/juridico/mla/en/blz/en_blz-int-text-cc.pdf> (last accessed May 2019).
- 282 *About Orozco v AG* (undated) Rights Advocacy Project, Faculty of Law, University of the West Indies <<http://u-rap.org/web2/index.php/2015-09-29-00-40-03/orozco-v-attorney-general-of-belize/item/2-caleb-orozco-v-attorney-general-of-belize-and-others#useful>> (last accessed May 2019).
- 283 Julia Scott, 'The Lonely Fight Against Belize's Antigay Laws', *The New York Times* (online), 22 May 2015 <https://www.nytimes.com/2015/05/24/magazine/the-lonely-fight-against-belize-antigay-laws.html?_r=0> (last accessed May 2019).
- 284 Ibid.
- 285 Kevin Mendez (Kevomendez1), *The challenge of being gay in Belize* (3 August 2017) One Young World blog, <<https://www.oneyoungworld.com/blog/challenge-being-gay-belize>> (last accessed May 2019).
- 286 E-mail interview with the author, response received 8 May 2019.
- 287 Ibid.
- 288 *Attorney General v Joseph* [2006] CCJ 1 per Wit J at [14] <http://www.worldcourts.com/ccj/eng/decisions/2006.11.08_Attorney_General_v_Joseph.htm> (last accessed May 2019)
- 289 Owen Bowcott, 'Belize gay rights campaigner is facing more death threats, says lawyer', *The Guardian* (online), 11 May 2013 <<https://www.theguardian.com/world/2013/may/10/belize-gay-rights-campaigner-threats>> (last accessed May 2019).
- 290 Ibid.
- 291 *Caleb Orozco v The Attorney General of Belize, et al*, Supreme Court of Belize, No. 668 of 2010, 10 August 2016 <<http://www.belizejudiciary.org/civil-judgments/2016/>> (last accessed April 2019).
- 292 *Report of the Working Group on the Universal Periodic Review: Belize*, UN GAOR, HRC 40th sess, Agenda Item 6, UN Doc A/HRC/40/14 (18 December 2018) recs 77.17–77.25 on 10–11, 77.31–77.32 on 11, 77.5–77.57 on 13, and 77.70 on 13 <<https://www.ohchr.org/EN/HRBodies/UPR/Pages/BZindex.aspx>> (last accessed April 2019).
- 293 *Belize turnaround on gay rights: 'Unbelievable!'* (20 November 2018) Erasing 76 Crimes <<https://76crimes.com/2018/11/20/belize-turnaround-on-gay-rights-unbelievable/>> (last accessed May 2019).
- 294 Aaron Humes, UNAIDS surveys: *Belizeans more accepting of LGBT; want more sex education in schools* (17 April 2019) Breaking Belize News <<https://www.breakingbelizenews.com/2015/04/17/unaid-surveys-belizeans-accepting-lgbt-sex-education-schools/>> (last accessed May 2019).
- 295 *Jason Jones v Attorney General of Trinidad & Tobago and others*, High Court of Justice of Trinidad and Tobago, No. CV2017-00720, 20 September 2018 <http://www.ttlawcourts.org/index.php/recent-judgments-archive/archive/index.php?option=com_content&view=article&id=8270&Itemid=122&tmpl=archive> (last accessed May 2019).

Africa: Seychelles

Seychelles' law criminalising same-sex sexual activity

13.60 Until 2016, section 151 of the Seychelles' *Penal Code* stated that:

Any person who:

- (a) has carnal knowledge of any person against the order of nature; or [...]
- (c) permits a male person to have carnal knowledge of him [...] against the order of nature, is guilty of a felony, and is liable to imprisonment for fourteen years.²⁹⁶

13.61 These provisions were enacted in 1955 under British rule.²⁹⁷ As with similar provisions in other former British colonies, the Seychelles' provisions criminalised same-sex sexual activity between men. The offence of 'carnal knowledge against the order of nature' also applied to heterosexual couples. Sex between women was not criminalised. The maximum penalty under section 151 was 14 years' imprisonment.

Impact of the law

13.62 While the Government of the Seychelles has said prosecutions have been rare under section 151,²⁹⁸ human rights advocates say that the law has been used as a justification for harassment, entrapment and extortion. For example, Amnesty International's former Regional Director for East Africa, Muthoni Wanyei, speaking on the eve of decriminalisation in 2016, said:

Even though the Seychelles have not prosecuted anyone, laws like this opens up members of the gay community to extortion. We often hear tales of men being lured into a sexual relationship and then being threatened.²⁹⁹

13.63 According to Ronny Arnephy, an advocate and co-founder of LGBTI Sey—a local LGBT+ advocacy and support NGO—the former law reinforced stigma against LGBT+ people.³⁰⁰

13.64 Adding to the stigma attached to same-sex sexual activity caused by criminalisation was the fact that section 151 also criminalised sex between humans and animals, effectively equating homosexuality with bestiality. This is an approach taken in the laws of a number of other countries in the Commonwealth.

Repeal of the Seychelles' law

13.65 Section 151 was repealed in response to international and local pressure. In 2011, the UN Human Rights Council raised the Seychelles' criminalisation of same-sex sexual activity during the Universal Periodic Review process. In response, the Government pledged to decriminalise. In the words of (then) Attorney General Ronny Govinden:

The Seychelles Government awareness arose due to the fact that the President, his cabinet and the national assembly were sensitive to the issue and saw it as one of national concern. It was in consonant with the drive towards a more pro rights society.³⁰¹

- 13.66 When the matter was raised again by the UN Human Rights Council in 2016, during the subsequent Universal Periodic Review for Seychelles, Govinden said:
- It is a priority for the country because whenever the Seychelles is participating in an international convention [...] we face pressures from other countries who are asking us to remove this law.³⁰²
- 13.67 Meanwhile, pressure was also applied by Seychellois calling for reform. This was led by LGBTI Sey, which lobbied members of the Seychelles Parliament, as well as the Ministry of Foreign Affairs and the Office of the Attorney-General.³⁰³ Government and community worked closely. Govinden confirmed that '[t]he Government had input from the LGBTI Seychelles association as part of the national consultation process'.³⁰⁴
- 13.68 Early in 2016, in his State of the Nation address, President James Michel announced his Government would amend section 151. Referring to its colonial origin, he said:
- Although this law is not enforced these days, it remains part of our legal system. This is an aberration. Seychelles is a society that has always been tolerant, where we respect divergent views and where we live in peace with everyone. We are not a homophobic society. Moreover, the Constitution of the Republic of Seychelles guarantees the protection of all citizens, without discrimination. We also have a United Nations human rights obligation, since 2011, to abolish all provisions in our laws that criminalise homosexuality between consenting adults. As a secular and democratic nation, Seychelles has to fulfil its national, international and constitutional obligations.³⁰⁵
- 13.69 Considering the Seychelles' Constitutional discrimination protections, it is important to note that, since 2006, Seychelles has provided legal protections against discrimination and harassment in employment, including on the ground of sexual orientation.³⁰⁶
- 13.70 Dismissing the idea of a referendum on whether Seychelles should decriminalise, Attorney General Govinden said:
- This is a simple amendment to the penal [sic] Code which can be done by the National Assembly and this avoids conflict.³⁰⁷
- 13.71 The *Penal Code (Amendment) Act 2016* was passed on 17 May 2016, the International Day Against Homophobia, Biphobia and Transphobia. Out of 28 members present in the National Assembly for the vote, 14 voted in favour, while the other half abstained. Four members were not present for the vote. The Act repealed sections 151(a) and (c).
- 13.72 After the National Assembly passed the amendment bill, Francesca Monnaie of the Popular Democratic Movement, who had voted for the reform, explained that her vote was 'based on human rights'. She also referred to Seychelles' Constitutional guarantee of equality:
- Our Constitution clearly states that all persons are equal [...] so I do not see why we should discriminate against a specific group based on their sexual orientation.³⁰⁸

Impact of decriminalisation and lessons from the process

Now I feel that I'm gonna be more open, you know, more free

Ronny Arnephy, LGBTI Sey³⁰⁹

13.73 Both Government and community representatives agree that the effect of decriminalising same-sex sexual activity has been positive.

13.74 Consistent with the views express by Arnephy, Govinden says:

There has been no backlash on the LGBTI community as a result of the change, to the contrary, this community now feel safer and more assertive in their quest for more recognition.

There has been no legal issues in enforcement.³¹⁰

13.75 Reflecting on his role as a legislator in the decriminalisation process, Govinden has observed:

As the AG in a very small jurisdiction, if there is political will, it's possible to effect expeditious legislative changes. I assisted in the cabinet memorandum composition; its cabinet presentation; the drafting of the amendments and I got involved in its enforcement. This might not be possible in bigger jurisdictions.³¹¹

I think our process should be emulated by the rest of the world.

Ronny Govinden, former Seychelles' Attorney General and now Supreme Court Justice³¹²

13.76 The 2016 amendment meant Seychelles was one of the first criminalising African countries to decriminalise same-sex sexual activity. It is also an example of good practice, because the reforms fully decriminalised same-sex sexual activity. This is shown in the checklist that follows.

FIGURE 32: Checklist for Seychelles’ laws on consensual same-sex sexual activity

<div>Checklist for Seychelles’ laws on consensual same-sex sexual activity</div> <div>These criteria are the same as those listed for consensual same-sex sexual activity in Part A of this report</div> <div>● Yes ● Partly ● No ● Unknown</div>	
1. Equality and non-discrimination	
<div>a. No laws criminalising same-sex sexual activity: Consensual same-sex sexual activity in private should not be criminalised. This includes ensuring the following offences, however described, are no longer criminalised when in private, whether through statute or common law:</div> <div><div><div>▪ indecency between people of the same sex;</div><div>▪ carnal knowledge/intercourse against the order of nature;</div><div>▪ buggery;</div><div>▪ sodomy;</div><div>▪ homosexuality;</div><div>▪ lesbianism;</div><div>▪ same-sex sexual relations; and</div><div>▪ fellatio or cunnilingus.</div></div></div>	●
<div>b. No other discriminatory sexual offences laws: There should be no other sexual offences laws that discriminate on the ground of sexual orientation. These laws include, but are not limited to:</div> <div><div><div>▪ age of consent laws that set different ages for consensual same-sex and heterosexual sexual activity, or for sexual acts that are particularly associated with either group;</div><div>▪ laws that restrict or prohibit so-called ‘promotion’ of homosexuality, such as information on HIV/AIDS, sexual education, support for LGBT+ people, or law reform campaigns; and</div><div>▪ any other public morality laws used to indirectly criminalise same-sex sexual activity, such as loitering, debauchery and vagrancy laws.</div></div></div>	●
<div>c. Non-discriminatory implementation and policing: Laws that are neutral on their face, including sexual offences, must not be implemented or enforced in a discriminatory way by disproportionately and negatively affecting LGBT+ people. Such laws must not be used to criminalise or stigmatise LGBT+ people.</div>	●

Checklist for Seychelles' laws on consensual same-sex sexual activity

These criteria are the same as those listed for consensual same-sex sexual activity in Part A of this report

● Yes ● Partly ● No ● Unknown

2. Dignity and respect

No derogatory language in the law: There should be no language, terminology or framing in sexual offences provisions that is derogatory, offensive or stigmatising to LGBT+ people. For example:

- 'buggery', 'sodomy', 'intercourse against the order of nature', 'indecency between male/female persons' and 'abominable crime';
- conflation of same-sex sexual activity with bestiality.



3. In Commonwealth nations that have decriminalised through court decision and not through reform of legislation, the following additional criteria apply

Respect the decision: Government respects and enforces the decision. In particular:

- **No arrests:** There should be no further arrests, prosecutions or convictions for same-sex sexual activity between consenting adults in private as inconsistent with the court decision.
- **Legislative reform:** Government should remove any legislative provisions that were struck down by the court for criminalising consensual same-sex sexual activity.

N/A

- 296 *Penal Code (Cap 158)* (Seychelles) s 151 <<http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/91750/106559/F1673434511/SYC91750.pdf>> (last accessed May 2019)
- 297 Rassin Vannier & Betymie Bonelame, 'Seychelles' parliament to consider decriminalising homosexuality in 2016', *Seychelles News Agency* (online), 1 March 2016, <<http://www.seychellesnewsagency.com/articles/4702/Seychelles'+parliament+to+consider+decriminalising+homosexuality+in+>> (last accessed May 2019).
- 298 Ibid.
- 299 Cited in Joe Morgan, 'The Seychelles will make gay sex legal', *Gay Star News* (online), 2 March 2016 < <http://www.gaystarnews.com/article/seychelles-has-officially-legalized-homosexuality/#gs.bVRJFcE>> (last accessed May 2019).
- 300 *Seychelles Decriminalizes Homosexuality!* (Irant Media, 2016) 1:56 <https://www.youtube.com/watch?v=AhqBW-_pEbs&feature=youtu.be> (last accessed May 2019).
- 301 E-mail interview with former Attorney General and now Justice of the Supreme Court, Ronny Govinden, on file with the authors.
- 302 Vannier & Bonelame, above n297.
- 303 *Seychelles Decriminalizes Homosexuality!* above n300, 3:09.
- 304 Govinden, above n301.
- 305 President James Alix Michel, 'State of the Nation Address' (Speech delivered at the Seychelles State House, 16 February 2016) <http://www.statehouse.gov.sc/speeches.php?news_id=2995> (last accessed May 2019). Cited in Nshira Turkson, 'A Victory for LGBT Rights in Seychelles', *The Atlantic* (online) 19 May 2016, <<http://www.theatlantic.com/international/archive/2016/05/lgbt-rights-seychelles/483503/>> (last accessed May 2019).
- 306 *Employment Act (Cap 690)* (Seychelles) pt VI, s 46A <<https://greybook.seyilii.org/w/se/CAP69#!fragment/zoupio-Toc385233359/BQCwhgziBcwMYgK4DsDWszlQewE4BUBTAD-wBdoAvbRABwEtsBaAfX2zgGYAOAVgCYOgngE4AlABpk2UoQgBFRIVwBPAAHl14iHFzYAN-noDCSNNACEyLYTC4ECpao1WbCAMP5SAIVUAlAKIAMn4AagCCAHKGFuKkYABGOKTsoq-JAA>> (last accessed May 2019).
- 307 Vannier & Bonelame, above n297.
- 308 Cited in Sharon Uranie, Patsy Athanase & Rassin Vannier, 'Seychelles parliament passes bill to decriminalize sodomy', *Seychelles News Agency* (online), 18 May 2016, <<http://www.seychellesnewsagency.com/articles/5198/Seychelles+parliament+passes+bill+to+decriminalize+sodomy>> (last accessed May 2019).
- 309 *Seychelles Decriminalizes Homosexuality!* above n300, 4:07.
- 310 Govinden, above n301.
- 311 Ibid.
- 312 Ibid.

Summary of decriminalisation in four other Commonwealth countries

Annexure 2 provides a timeline of decriminalisation across Commonwealth countries. The summaries below provide a snapshot of the decriminalisation process in four Commonwealth countries in different regions of the world.

England and Wales

English laws against same-sex sexual activity are the origin of similar laws now in place across the Commonwealth. The slow reform of these laws over the past half century is also at odds with good practice.

In 1861, the *Offences Against the Person Act* removed the death penalty for anal or oral intercourse between men and replaced it with prison terms. The *Criminal Law Amendment Act* of 1885 extended this punishment to all sexual contact between men.

In 1967, same-sex sexual activity between men was partially decriminalised by the *Sexual Offences Act*. The primary reason cited by law-makers for this reform was privacy. Restrictions continued to apply to same-sex sexual activity that did not apply to sex between a man and a woman. This included a strict interpretation of privacy that continued to criminalise same-sex sexual activity if another person was present in the same home, or if the activity was in a place to which the public might have access, such as a hotel.

Another major restriction was an age of consent of 21 years for male same-sex sexual activity, which was significantly higher than the heterosexual age of consent of 16 years.

These restrictions were considered by the European Commission of Human Rights, including in *Sutherland v United Kingdom*, in which the European Commission found the offending English law discriminatory.³¹³ Such decisions led to the age of consent being made equal in 2000 by the *Sexual Offences (Amendment) Act*. The 2003 *Sexual Offences Act* removed all discriminatory provisions and language from the criminal law in England and Wales.

The English experience recommends against piecemeal reform. It could be argued that this reform was piecemeal because the context was the reform of sexual offences, rather than implementation of human rights standards. It took 36 years for consensual same-sex sexual activity to be fully decriminalised, and this was not achieved until decriminalisation became an issue of human rights.

Canada

Canada followed a similar path to England and Wales. Anal sex remained punishable by death in Canada until 1869. The *Criminal Code of Canada* criminalised all acts of 'buggery' and 'gross indecency', including consensual acts engaged in by members of the same-sex, until partial decriminalisation of same-sex sexual activity in 1969. As in England, privacy was cited by law-makers as the principal reason for reform. However, buggery and gross indecency remained criminal offences except for consensual acts that took place in private between husbands and wives or any two persons who were 21 years of age or older.

In 1988, the gross indecency offence was repealed and 'buggery' was renamed 'anal intercourse', with the age of consent for this act being lowered to 18 years of age.³¹⁴ This meant, for example, that at the time of reform the age of consent for vaginal sex between unmarried heterosexual couples was 14 years,³¹⁵ while the age of consent for anal sex between unmarried couples, including same-sex couples, was higher. Successive decisions by provincial courts found that the anal intercourse offence violated the *Canadian Charter of Rights and Freedoms*.³¹⁶ These decisions found the offence to be discriminatory, including on the basis of sexual orientation, and thus in violation of the equality provisions of the Charter. However, these provincial decisions did not have national application, and even where they did apply, there continued to be charges laid under section 159.³¹⁷ In June 2019, the anal intercourse offence was repealed.³¹⁸

The *Criminal Code of Canada* also used to contain a number of offences relating to 'bawdy houses', defined as including a place that is kept or occupied for the practice of acts of indecency. It has been estimated that 1,300 same-sex attracted men were charged under these laws between 1968 and 2004.³¹⁹ These laws were also repealed in June 2019.³²⁰

South Africa

Same-sex sexual activity was partially decriminalised in 1997 and 1998 by two court decisions citing the prohibition on discrimination on the ground of sexual orientation in the South African *Interim Constitution* of 1994.³²¹

The decision in the first case, *S v Kampher*, applied only to anal sex, and only in the Cape Province.³²² The South African High Court's decision in the second case, *National Coalition for Gay and Lesbian Equality v Minister of Justice*, applied to all same-sex sexual activity across the entire nation.³²³ These decisions made it clear that the offences ceased to operate when the *Interim Constitution* was enacted in 1994.

These were globally-significant decisions because they set a precedent for the decriminalisation of same-sex sexual activity under national human rights instruments, and for other countries in Africa generally.

However, these decisions left in place an age of consent of 19 years for same-sex sexual activity while the age of consent for heterosexual activity was 16 years. In 2007, this was rectified by the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*, which equalised the age of consent.

The precedents set in these South African decisions reflect good practice, but it can only be said that South Africa met all the good practice principles after the removal of its discriminatory age of consent a decade after the landmark court rulings.

Fiji

In 1997, Fiji became the second country after South Africa to provide a constitutional protection against discrimination on the grounds of sexual orientation.

In 2005, a conviction under Fiji's laws against same-sex sexual activity was overturned in the Supreme Court, based, in part, on precedents set in South Africa.³²⁴

In 2009, the *Crimes Decree* (now called the *Crimes Act 2009*) fully decriminalised same-sex sexual activity by removing all laws against that activity.³²⁵ This made Fiji the first Pacific Island nation to repeal its colonial-era laws against same-sex sexual activity.

Fiji is an example of good practice because a combination of legislation and judicial action within a human rights framework led to the complete decriminalisation of same-sex sexual activity.

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- 313 Above n139.
- 314 The new offence of 'anal intercourse' was renumbered as section 159.
- 315 The age of consent was subsequently raised to 16 in 2008.
- 316 For example, *R v C M* [1995] CanLI 8924 (ON CA) (24 May 1995) <<https://www.canlii.org/en/on/onca/doc/1995/1995canlii8924/1995canlii8924.html>> and *R v Roth*, 2002 ABQB 145 (CanLI) (7 February 2001).
- 317 M Smith, 'Homophobia and Homonationalism: LGBTQ Law Reform in Canada' [2019] Social and Legal Studies (published online on 10 January 2019), <<https://journals.sagepub.com/doi/full/10.1177/0964663918822150>> (last accessed May 2019).
- 318 Former Bill C-75, An Act to amend the *Criminal Code*, the *Youth Criminal Justice Act* and other Acts and to make consequential amendments to other Acts 2019, s 54 <<https://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/royal-assent>> (last accessed November 2019).
- 319 Tom Hooper, cited in Rob Salerno, 'Liberals' justice reform bill leaves out some queer people and sex workers, activists say' (2 May 2018) Xtra <<https://www.dailyxtra.com/liberals-justice-reform-bill-leaves-out-some-queer-people-and-sex-workers-activists-say-86291>> (last accessed May 2019); see also, Tom Hooper, Gary Kinsman & Karen Pearlston, Anti-69 FAQ (14 March 2019) Active History, 4. If decriminalization didn't happen in 1969, when did it happen? <<http://activehistory.ca/2019/03/anti-69-faq/>> (last accessed May 2019).
- 320 Above n318, s 73.
- 321 Anal sex and 'unnatural sexual activity' were common law crimes in South Africa.
- 322 *S v Kampher*, 1997 (9) BCLR 1283 (C), 1997 (4) SA 460 (C) (4 August 1997), Cape Provincial Division.
- 323 *National Coalition for Gay and Lesbian Equality et al v Minister of Justice et al* (1998) 37 International Legal Materials 1101 <https://homepage.univie.ac.at/elisabeth.holzleithner/sueda-fr_sodilaws_dec.html> (last accessed May 2019).
- 324 Section 175 of Fiji's Penal Code punished same-sex sexual activity with up to 14 years' imprisonment, 'with or without corporal punishment'. Court cases overturning this provision are: *Nadan and State* [2005] FJLawRp 36; [2005] FLR 229 (26 August 2005); <<http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJLawRp/2005/36.html>>; *McCoskar v The State* [2005] FJHC 500; HAA0085 & 86.2005 (26 August 2005) <<http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJHC/2005/500.html>>; *Nadan v The State* [2005] FJHC 252; HAA0085 & 0086.2005 (26 August 2005) <<http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJHC/2005/252.html>>; *Nadan v The State* [2005] FJHC 1; Haa0085 & 0086.2005 (26 August 2005) <<http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJHC/2005/1.html>> (last accessed May 2019).
- 325 *Fiji first Pacific Island nation with colonial-era sodomy laws to formally to [sic] decriminalize homosexuality* (2 March 2010) UN AIDS <<http://www.unaids.org/en/resources/presscentre/featurestories/2010/march/20100304fiji>> (last accessed May 2019).

14. Age of consent to sexual activity

- 14.1 This section provides a broad overview of the extent to which good practice criteria on age of consent to sexual activity are being met within the Commonwealth. It illustrates the low number of Commonwealth countries with good practice in this area.

Commonwealth countries and consent to engage in sexual activity

- 14.2 The practices within the Commonwealth in respect of age of consent to sexual activity vary enormously. Some countries meet some of the good practice criteria, while several don't meet any.
- 14.3 For example, two countries—Malawi and Nigeria—fail to meet the criteria by having (among other things) provisions that set different ages of consent to sexual activity for males and females. In Malawi, the age of consent for males is 14 and for females it is 13. In Nigeria, the age of consent for males is 14 and for females it is 16. Neither country has an age of consent in relation to same-sex sexual activity because it is criminalised.
- 14.4 Pakistan is another example of poor practice. It is one of several Commonwealth countries that indirectly implements different ages of consent to sexual activity for males and females because of its marriage laws. The age of marriage, which discriminates on the ground of sex, is set at 18 for males and 16 for females, while all sex outside of marriage is prohibited. It also lowers the marriage age for Muslim girls to 14 years. Child marriage (marriage under 18) is a harmful practice and violates international human rights law.

Pakistan Penal Code³²⁶

496B. Fornication:

- (1) A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another.
- (2) Whoever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees.

The Child Marriage Restraint Act 1929³²⁷

2. Definitions. In this Act, unless there is anything repugnant in the subject or context—
 - (a) “child” means a person who, if a male, is under 18 years of age, and if a female, is under [sixteen] years of age;
 - (b) “child marriage” means a marriage to which either of the contracting parties is a child;

[...]

5. Punishment for Solemnising a child marriage. Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.
- 14.5 Regardless of the individual contexts, this age distinction is clearly discriminatory and is not good practice. Further lowering the marriage age for Muslim girls is also discriminatory and inconsistent with good practice in terms of the minimum marriage age.
- 14.6 The Bahamas maintains parity in the age of consent for males and females, but has a different age of consent for same-sex and opposite-sex sexual activity. The age of consent to opposite-sex sexual activity is 16, while for same-sex sexual activity it is 18.³²⁸
- 14.7 Trinidad and Tobago applies a close-in-age defence to the crime of sexual penetration of a child, but this is expressly excluded for sex between people under the age of 18 who are of the same sex:

Children Act 2012³²⁹

20. (1) A person sixteen years of age or over but under twenty-one years of age is not liable under section 18 if—
- (a) he is less than three years older than the child against whom he is purported to have perpetrated the offence;
 - (b) he is not in a familial relationship with the child nor in a position of trust in relation to the child;
 - (c) **he is not of the same sex as the child;** and
 - (d) the circumstances do not reveal any element of exploitation, coercion, threat, deception, grooming or manipulation in the relationship.
- (2) A person fourteen years of age or over but under sixteen years of age is not liable under section 18 or 19 if—
- (a) he is less than two years older than the child against whom he is purported to have perpetrated the offence;
 - (b) he is not in a familial relationship with the child nor in a position of trust in relation to the child;
 - (c) **he is not of the same sex as the child;** and
 - (d) the circumstances do not reveal any element of exploitation, coercion, threat, deception, grooming or manipulation in the relationship.
- (3) A person twelve years of age or over but under fourteen years of age is not liable under section 18 or 19 if—
- (a) he is less than two years older than the child against whom he is purported to have perpetrated the offence;
 - (b) he is not in a familial relationship with the child nor in a position of trust in relation to the child;
 - (c) **he is not of the same sex as the child;** and
 - (d) the circumstances do not reveal any element of exploitation, coercion, threat, deception, grooming or manipulation in the relationship.

- 14.8 Within the Commonwealth, only 21 countries have laws which ostensibly provide an equal age of consent both in relation to gender and sexual orientation. These are:
- Africa: Ghana, Lesotho, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Uganda;
 - Asia: India;
 - Caribbean and the Americas: Belize, Canada;
 - Europe: Cyprus, Malta, United Kingdom;
 - Pacific: Australia, Fiji, Nauru, New Zealand, Samoa, Vanuatu.
- 14.9 Of these 21 countries, 19 have set the age of consent at between 16 and 18 years of age:
- Africa: Ghana, Lesotho, Mauritius, Mozambique, Rwanda, South Africa, Uganda;
 - Asia: India;
 - Caribbean and the Americas: Belize, Canada;
 - Europe: Cyprus, Malta, United Kingdom;
 - Pacific: Australia, Fiji, Nauru, New Zealand, Samoa, Vanuatu.
- 14.10 Of these 19 countries, 15 do not have any provisions criminalising types of sexual conduct that could be applied in ways that target same-sex activity, such as 'sodomy', 'buggery', or 'unnatural acts':
- Africa: Lesotho, Mozambique, Rwanda, South Africa;
 - Asia: India;
 - Caribbean and the Americas: Belize, Canada;
 - Europe: Cyprus, Malta, United Kingdom;
 - Pacific: Australia, Fiji, Nauru, New Zealand, Vanuatu.
- 14.11 Of these 15 countries, only 6 provide a close-in-age defence:
- Africa: Rwanda, South Africa;
 - Asia: None;
 - Caribbean and the Americas: Belize, Canada;
 - Europe: None;
 - Pacific: Australia, Nauru
- 14.12 As the assessment above demonstrates, while there are examples of each of the good practice criteria across the Commonwealth, the number of countries which meet all or most of these criteria is low. Indeed, there are several examples of bad practice age of consent laws, including clearly discriminatory provisions such as different minimum ages on the basis of gender and sexual orientation. It is therefore clear that reform of age of consent laws is urgently needed in all regions of the Commonwealth.

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- 326 *Pakistan Penal Code 1860* (Act XLV of 1860) s 496B <<http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html>> (last accessed September 2019).
- 327 *The Child Marriage Restraint Act 1929* (Pakistan) (Act XIX of 1929) ss 2 & 5 <<http://pakistan-code.gov.pk/pdffiles/administrator0cb12b901d4304d7e5463da076d88639.pdf>> (last accessed September 2019). Note: paragraph (a) of the definition of “child” is amended in respect of Muslim citizens of Pakistan by the *Muslim Family Laws Ordinance 1961*, which lowers the age for females to 14 years.
- 328 *Sexual Offences and Domestic Violence Act 2010* (Bahamas) ss 11, 16(2)(a) & 16(3)(a) <https://www.oas.org/dil/Sexual_Offences_and_Domestic_Violence_Act_Bahamas.pdf> (last accessed September 2019).
- 329 *Children Act 2012* (Trinidad and Tobago) (Act 12 of 2012) ss 18–20 [emphasis added] <http://www.legalaffairs.gov.tt/Laws_listing.html> (last accessed September 2019).

15. Conclusion

- 15.1 This report sets out, for the first time, detailed criteria for good practice, human rights compliant laws on rape/sexual assault, including in relation to children and people with disability, consensual same-sex sexual activity, and age of consent. Using detailed case studies, it demonstrates how those criteria can be applied to specific legislation in member states of the Commonwealth.
- 15.2 While it is not intended to be an exhaustive study, it clearly indicates several important trends in the reform of sexual offences laws. In particular, it shows a trend in Global South countries towards decriminalisation of same-sex sexual activity. It also shows that in these countries there is a tendency towards full decriminalisation, rather than the partial decriminalisation initially favoured by many in the Global North, which were the first to reform these laws.
- 15.3 In the context of rape/sexual assault law reform, with the exception of Asia, there is a trend in every region of the Commonwealth towards the overhaul of outdated and discriminatory criminal laws that, among other things:
- excluded rape of males;
 - excluded rape using body parts other than a penis, or using objects;
 - allowed a marital rape exemption;
 - allowed a defence of consent for rape/sexual assault of young children; and
 - required third party corroboration for a complaint of rape to be proved, a rule that is not applicable to other criminal offences.
- 15.4 Nonetheless, there are still many countries that need to reform their rape/sexual assault laws to remove these and other prejudicial laws. Until countries do this, many victims/survivors will simply not report the crime to police or will be discriminated against in the trial procedure, and perpetrators will evade justice.
- 15.5 The report clearly shows that, in relation to rape/sexual offence laws and people with disability, reform is lagging far behind. Only two countries in the Commonwealth were identified as having sexual offences laws that meet the good practice criteria. This means that the sexual offences laws of 51 other Commonwealth countries continue to treat people with disability unequally compared to people without disability. A disturbing number of these countries continue to criminalise all sexual activity with people with disability, regardless of their capacity to consent to sexual activity. Under such laws, a person who engages in consensual sexual activity with a person with a disability commits a serious criminal offence. As well as being of dubious protective value, these laws are paternalistic and deny the fundamental rights of people with disability to sexual autonomy. The use of derogatory language describing people with disability in sexual offences provisions also remains common. Terms used to describe people with intellectual disabilities, such as 'imbecile', became outdated and unacceptable decades ago. They need to be removed from legislation without delay.

- 15.6 The effects of Britain's export of its discriminatory sexual offence laws to its former colonies—now members of the Commonwealth—have been extensive, long-lasting and negative. The export of the criminalisation of homosexuality and same-sex sexual activity, and narrow and prejudicial rape/sexual assault criminal provisions and rules of evidence have caused significant harm to those affected, as well as their families and communities. Stigma, violence, discrimination, persecution, corruption and a weakened rule of law have been their legacy. Although some members of the Commonwealth have made important and significant reforms to their sexual offence laws, many have not. Sadly, for the people of those countries, these laws remain in place, whether through lack of resources, technical capacity, prioritisation, or political will for reform. Not only are these laws in violation of the countries' legal obligations under international law, in most cases they are also inconsistent with national constitutional guarantees of equality and non-discrimination. Crucially, however, these laws continue to ruin lives. Their immediate reform is critical.

Annexures

1. Glossary of terms

ACHR	American Convention on Human Rights (see n23 for details).
ACHPR	African Charter on Human and People’s Rights (see n21 for details)
ALRC	Australian Law Reform Commission
ASEAN	Association of Southeast Asian Nations
Banjul Charter	See above, ACHPR
Beijing Platform for Action	Beijing Declaration and Platform for Action (see n9 for details).
CAT	Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women (see n16 for details)
CEDAW Committee	UN Committee on the Elimination of Discrimination Against Women
CHOGM	Commonwealth Heads of Government Meeting
The Commonwealth	The 53 member countries of the Commonwealth
Convention of Belém do Pará	Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (see n24 for details)
CRC	Convention on the Rights of the Child (see n16 for details)
CRPD	Convention on the Rights of Persons with Disabilities (see n20 for details)
Disability Standard Rules	Standard Rules on the Equalization of Opportunities for Persons with Disabilities
ECHR	European Convention on Human Rights
GR	General Recommendation
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights (see n14 for details)
ICESCR	International Covenant on Economic, Social and Cultural Rights (see n17 for details)
Istanbul Convention	Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence (see n25 for details)
LGBT+	Inclusive term to encompass people of every sexual orientation and gender identity, including people who do not identify with any gender

Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (see n22 for details)
Naimey Guidelines	Guidelines on Combating Sexual Violence and its Consequences in Africa (see n65 for details)
Pact of San José	See above, ACHR
SADC	South African Development Community
The Trust	Human Dignity Trust
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Handbook	Handbook for Legislation on Violence against Women (see n10 for details)
UNICEF	UN International Children's Emergency Fund
UNODC	UN Office on Drugs and Crime
UN Women	UN Entity for Gender Equality and the Empowerment of Women
WHO	World Health Organization
Disability World Programme of Action	World Programme of Action Concerning Disabled Persons (see n73 for details)
Yogyakarta Principles	The Yogyakarta Principles (see n9 for details)
Yogyakarta Principles plus 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 (see n9 for details)


2. Timetable of decriminalisation of same-sex sexual activity in the Commonwealth

This chart represents a timeline of decriminalisation in the Commonwealth, from 1967 until the present day. It shows that countries achieved decriminalisation through legislative reform, court decisions, or a combination of both. It also shows how long it took each country to decriminalise and which countries have not yet completed that process. It illustrates that decriminalisation is accelerating among Global South countries of the Commonwealth, and that there is a clear trend by these countries towards full decriminalisation compared to the partial decriminalisation that was characteristic of many Global North countries in the late 20th century.

Note: this chart does not assess whether a country meets the good practice criteria for decriminalisation used in this report.




Key

- A green circle for a country indicates that legislative reforms achieved full decriminalisation of same-sex sexual activity by repealing criminal offences, equalising age of consent, and removing other sexual offences enforced against LGBT+ people. This does not mean that these countries have removed all laws that discriminate against LGBT+ people, or all derogatory language to describe offences.
- An amber circle for a country indicates that legislative reforms achieved only partial decriminalisation of same-sex sexual activity. This means, for example, that the reforms were limited to repealing criminal offences for same-sex sexual activity but retained or imposed different ages of consent for that activity compared to heterosexual sexual activity.
- A blue circle for a country indicates that its national courts overturned the laws criminalising same-sex sexual activity or made another decision that contributed to decriminalisation in that country.
- A blue ring for a country indicates that a decision of a regional human rights court or UN human rights treaty body found the criminalising laws to be in violation of that country's human rights obligations. These decisions were highly influential and helped lead to reform in the country concerned.

Year	Jurisdiction	Legislative Reform	Court Ruling
1967	England and Wales	●	
1968			
1969	Canada	●	
1970			
1971			
1972			
1973	Malta	●	
1974			
1975	South Australia, Australia	●	
1976	Australian Capital Territory, Australia	●	
1977			
1978			
1979			
1980	Victoria, Australia	●	
1981	Northern Ireland		 European Court of Human Rights <i>(Dudgeon v UK)</i> ³³⁰
	Scotland	●	
1982	Northern Ireland	●	
1983	Northern Territory, Australia	●	
1984	New South Wales, Australia	●	
1985			
1986	New Zealand	●	
1987			
1988			
1989	Western Australia, Australia	●	
1990			
1990			
1991	Queensland, Australia	●	
1992	Isle of Man	●	

Year	Jurisdiction	Legislative Reform	Court Ruling
1993			
1994	Bermuda	●	
	Tasmania, Australia		○ UN Human Rights Committee <i>(Toonen v Australia)</i> ³³¹
1995			
1996			
1997	Tasmania, Australia	●	
	Cyprus		○ European Court of Human Rights <i>(Modinos v Cyprus)</i> ³³²
1998	Cyprus	●	
	South Africa	●	● South Africa Constitutional Court <i>(National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others)</i> ³³³
1999			
2000			
2001	England (age of consent)		○ European Commission of Human Rights <i>(Sutherland v UK)</i> ³³⁴
	Scotland (continued offences)	●	
2002	Northern Ireland (continued offences)	●	
	Cyprus (continued offences)	●	
	Western Australia, Australia (continued offences)	●	

Year	Jurisdiction	Legislative Reform	Court Ruling
2003	Northern Territory, Australia (continued offences)	●	
	England (continued offences)	●	
	New South Wales, Australia (continued offences)	●	
2004			
2005	Fiji		● Fiji High Court (<i>Nadan v The State</i> ; <i>McCoskar v The State</i>) ³³⁵
2006	Isle of Man (continued offences)	●	
2007	Vanuatu	●	
	The Bahamas	●	
	South Africa (continued offences)	●	
2008			
2009			
2010	Fiji	●	
2011			
2012	Lesotho	●	
2013			
2014			
2015	Mozambique	●	
2016	Seychelles	●	
	Belize		● Supreme Court of Belize (<i>Caleb Orozco v Attorney General of Belize</i>) ³³⁶
	Nauru	●	
	Queensland, Australia (continued offences)	●	
2017			

Year	Jurisdiction	Legislative Reform	Court Ruling
2018	India		 <p>Delhi High Court <i>(Navtej Singh Johar v Union of Indian Ministry of Land and Justice Secretary)</i>³³⁷</p>
	Trinidad & Tobago		 <p>High Court of Justice of Trinidad and Tobago <i>(Jason Jones v Attorney General of Trinidad & Tobago and others)</i>³³⁸</p>
2019	Botswana		 <p>High Court of Botswana <i>(Motshidiemang v Attorney General of Botswana)</i>³³⁹</p>

³³⁰ Above n129.

³³¹ Above n132.

³³² Above n131.

³³³ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] CCT 11/98 (9 October 1998) <<http://www.saflii.org/za/cases/ZACC/1998/15.pdf>> (last accessed August 2019).

³³⁴ Above n139.

³³⁵ Above n324.

³³⁶ Above n291.

³³⁷ Above n260.

³³⁸ Above n295.

³³⁹ *Letsweletse Motshidiemang v Attorney General* [2019] MAHGB-000591-16 (11 June 2019) <<https://www.humandignitytrust.org/wp-content/uploads/resources/Motshidiemang-V-Attorney-General-Botswana-2019.pdf>> (last accessed July 2019).



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