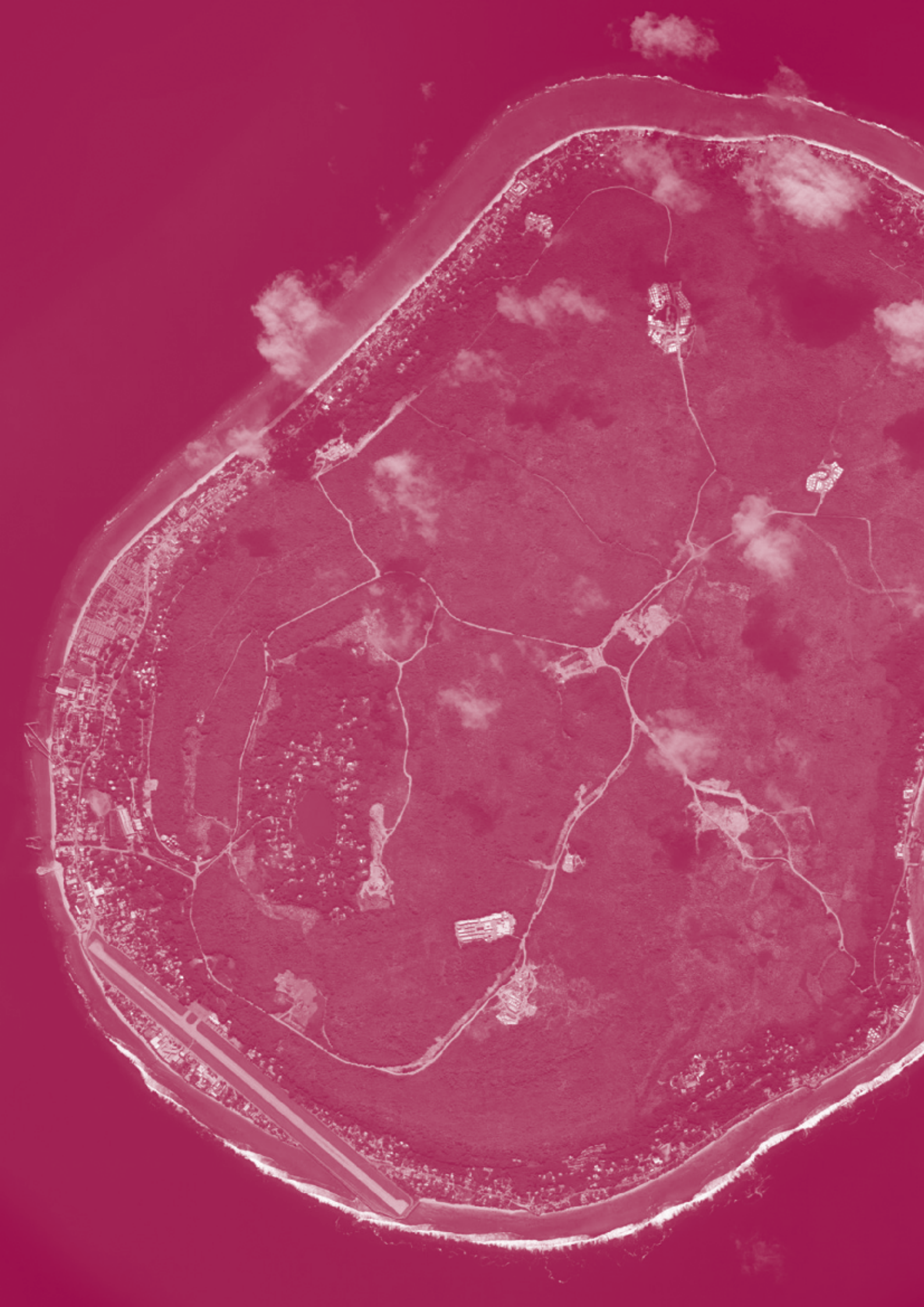




Case Study of Nauru



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 lesbian, gay, bisexual and transgender ('LGBT') people beyond the protection of the law and fostering a climate of fear, stigma, discrimination and violence.

The Trust provides technical legal assistance upon request to local human rights defenders, lawyers and governments seeking to eradicate these discriminatory laws.

With generous funding from Global Affairs Canada, the Human Dignity Trust has developed a series of case studies on the ways in which Commonwealth governments around the world have achieved reform of these laws and other sexual offences laws that discriminate against women, children, LGBT people and other groups. The Trust has also initiated the establishment of a Commonwealth Group of Experts on legislative reform comprised of legal, political, academic and other experts with experience in reform of discriminatory sexual offences laws.

The research for this series of case studies has been possible thanks to the insight and assistance of members of the Commonwealth Group of Experts and many others in the relevant countries who helped initiate, steer, inform and implement sexual offences law reform to bring sexual offences laws into compliance with international and domestic human rights standards.

ACKNOWLEDGEMENTS

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¹ Noel Power, Chloe Binding and Lisa Borthwick.

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INTRODUCTION


INTRODUCTION

Discriminatory sexual offence laws continue to impact the lives of many Commonwealth citizens, particularly affecting women, children, and LGBT people. These laws are at odds with international and regional human rights norms and domestic constitutional law. They undermine human rights and perpetuate violence, hate crimes and discrimination, and threaten the health and prosperity of entire societies.

Discriminatory laws are apparent in the sexual offences provisions of many Commonwealth criminal codes, as well as in the absence of protective legislation. For example, many Commonwealth countries have different ages of consent for sexual relations and marriage for males and females. Rape provisions are often gender-specific and do not cover all forms of rape including rape with objects. Marital rape remains lawful in half of all Commonwealth countries. Laws protecting against sexual harassment and child sexual grooming are uneven across the Commonwealth. In two-thirds of Commonwealth member states, consensual same-sex sexual intimacy in private between adults is criminalised. Many countries have laws that are used to discriminate against transgender people including cross-dressing, impersonation and vagrancy laws. Very few Commonwealth countries have legislation to recognise, prevent and punish hate crimes, including those committed on the basis of sexual orientation or gender identity.

Several countries have, however, made real progress in reforming their laws through either the wholesale updating of criminal codes, allowing multiple issues to be tackled together, or through targeted reforms. Some of the most recent examples are as follows:

- **Palau** in 2012 and 2014, with the assistance of model laws, respectively modernised its sexual offences laws and completed the wholesale updating of its penal code;
- **Belize** in 2014 enacted major reforms to its colonial-era sexual offences laws, including making rape laws gender neutral, and it achieved decriminalisation of consensual same-sex sexual acts in 2016 through the courts;
- **Northern Cyprus** in 2014 repealed a law that criminalised consensual same-sex sexual conduct, prompted by litigation before the European Court of Human Rights, as part of a package of reforms to the sexual offences chapter of its colonial-era criminal code;
- **Mozambique** in 2015 completed a wholesale updating of its penal code, including the modernisation of its sexual offences laws, drawing on the Portuguese penal code for inspiration;
- **Seychelles** in 2016 repealed a law criminalising consensual same-sex sexual intimacy between adults; and
- **Nauru** in 2016, with international assistance, completed a wholesale updating of its criminal code, including the modernisation of its sexual offences laws.



Law reform can play a key role in advancing human rights in relation to sexual and physical integrity and health, and is an important part of a comprehensive strategy to reduce crimes, particularly sexual crimes, as well as address the persecutory and discriminatory dimensions of laws that exist on many statute books, ensuring a criminal justice regime that meets international human rights obligations and is fit for the 21st century.

The above examples demonstrate that different countries have taken diverse approaches to reforming sexual offences laws. The Human Dignity Trust has compiled a series of case studies to document the ways and means that each of these countries has achieved reform.

By showcasing these examples, it is hoped that other countries can be inspired and assisted to undertake similar reforms.



EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

Since the early 2000s, many nations across the Pacific region have been reviewing their domestic legal frameworks to modernise their laws, particularly criminal legislation, to provide greater protection for women, children, LGBT people and other vulnerable and marginalised groups. The focus of this report is on the reforms that have taken place in Nauru.

From 2009, Nauru embarked on a wholesale review of its 1899 Criminal Code ('Criminal Code'), with the aim of simplifying, modernising and strengthening criminal offences in the country so that they met the interests and needs of Nauru's developing society and the various facets of the criminal justice system.² The reform entailed a comprehensive overhaul of Nauru's criminal law, including its sexual offences laws, resulting in the enactment of the new Crimes Act of 2016 ('Crimes Act 2016'),³ This was achieved with extensive international assistance and expertise.

Due to limited access to the individuals involved and materials related to the review of the Criminal Code and the enactment of the Crimes Act 2016 in Nauru, our case study and the conclusions we have been able to draw are based solely on the information that was available to us. It is also important to state at the outset that this report's central focus is the legal reform of Nauru's sexual offences laws, which was one element of the Crimes Act 2016. This process of reform in part took place at a time in which there was widespread concern for other human rights issues and the rule of law in Nauru. The overhaul of Nauru's colonial-era criminal law is a positive step and an important example of wholesale legal reform, and it is outside the scope of this report to address or analyse other serious allegations of human rights violations in the country.

Background

Throughout the 19th century, Nauru was a German colony. It was subsequently granted to Britain, Australia and New Zealand as a trustee mandate following World War I. Australia became the primary administrator of the trust and, other than a brief occupation by Japan in World War II, Nauru remained an Australian protectorate until the middle of the 20th century. On 31 January 1968, Nauru gained its independence and became the world's smallest independent republic.

Sexual Offences Prior to Reform

In light of the country's political history, Nauru's criminal law (including its sexual offences provisions) largely reflected the approach taken by its former colonial and administrative power.

² United Nations Human Rights Council, National report - Nauru, A/HRC/WG.6/23/NRU/1 14 October 2015, para. 55. (available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/237/21/PDF/G1523721.pdf?OpenElement>).

³ Nauru Crimes Act of 2016, 12 May 2016 (available at: http://ronlaw.gov.nr/nauru_lpms/files/acts/f68fdcd4363b5f0b4630ac4c9c9f1202.pdf). An extract can be found at section 10 of the Annex.

Nauru's sexual offences legislation was largely based on the Queensland Criminal Code 1899, developed by Sir Samuel Walk Griffith which drew heavily on Stephen's Code for England. Consequently, the origins of Nauru's Criminal Code can be traced to the former colonial power of Britain. The Criminal Code was generally seen as an inherited set of archaic provisions that did not accord with human rights and was ill-equipped for modern interpretation and the prosecution of sexual offences.

The provisions lacked comprehensive statutory definition on the one hand, whilst where descriptions existed they were either vague or overly definitive. The provisions were furthermore discriminatory on the basis of gender, age and marital status, and used archaic and debasing language such as 'idiot' or 'imbecile' when describing persons living with disabilities.

Drivers of Reform

The primary catalyst for comprehensive reform of Nauru's Criminal Code were the combined efforts of dedicated individuals in Nauru and committed international experts who created the necessary environment and opportunity. The local stakeholders were a new reformist government focused on modernising Nauru's legislation, the Office of Parliamentary Counsel who was engaged to assist drafting legislation, and the Nauru Department of Justice and Border Control. These bodies collaborated with the Australian Attorney General's Office ('AAG') to completely overhaul the Criminal Code.

The international sphere also played a role in the reforms in Nauru. Nauru has ratified numerous international human rights conventions and treaties and, in doing so, has made international commitments to human rights. The government has sought to implement the international human rights conventions that they have signed up to and the recommendations that they have received (notably in respect of the Convention on the Rights of the Child ('CRC') and the Convention on the Elimination of All forms of Discrimination Against Women ('CEDAW')), and have engaged at the international level. All of this has played an important influencing role in Nauru's legislative reform efforts over the last two decades.

The Reform Process

The reform process in Nauru is an example of how crucial international and regional technical assistance is when a government is embarking on legislative reform. Legal technical assistance and regional support was provided by the International Legal Assistance Branch of the AAG.

The review of Nauru's Criminal Code was instigated in 2009 and the Crimes Act 2016 was passed by Parliament on 12 May 2016. Throughout the seven-year period, Nauru and the AAG undertook a comprehensive review of the existing Criminal Code, undertook stakeholder consultations, and drafted the Crimes Act 2016.

EXECUTIVE SUMMARY

Key Changes to Sexual Offences Laws under Nauru's Crimes Act 2016

The Crimes Act 2016 comprehensively reformed Nauru's entire Criminal Code, with particular emphasis on sexual offences provisions.⁴

Importantly, the Crimes Act 2016 sought to encompass all forms of sexual violations with appropriate penalties, sufficiently graded in terms of their seriousness and determined on the basis of the severity of the impact on the victim rather than conceptions of morality and decency. The Crimes Act 2016 sought to reflect this legal framework by instituting gender neutral language, widening the definitions of sexual assault to include non-penile penetrative violations, incorporating aggravating circumstances and contextual factors, and removing the archaic language entrenched in morality. The Crimes Act 2016 also incorporated a statutory definition of consent by requiring "free and voluntary agreement" and providing for a list of circumstances in which consent does not exist. This has been largely achieved, although some shortcomings remain, such as the scope of the offence of "indecent acts" and the age limitations that have been placed on child sexual offences (specific protection only applying to those under 16 rather than 18).

Post-Reform Environment in Nauru

The Crimes Act 2016 was in many respects a landmark piece of legislation and an extensive statute. However, we have found no evidence of a comprehensive programme of implementation being undertaken and there appears to have been only limited awareness-raising and training conducted. We have been unable to ascertain why a comprehensive implementation programme was not rolled out (or to the extent it was, why this is not public information), nor why more steps were not taken to raise awareness amongst the public. This latter point is particularly surprising given that there appears to have been no public consultation undertaken as part of the review and reform of the Criminal Code. Resources may have been a significant factor in this regard.

A lack of comprehensive publicly available information and statistical data in Nauru has made it difficult to conclusively determine whether there has been any change to the reporting, charging or prosecution of sex crimes. This means that it is impossible to draw meaningful conclusions as to the desired impact of the new legislation in the country. From the limited publicly available information, it seems that sexual offences are being prosecuted under the Crimes Act 2016 (albeit limited in number) and there may be an increase in reporting. Both are positive moves.

Nauru has continued to develop its legal framework outside of the Crimes Act 2016, enacting further legislation to provide enhanced protection and promote the rights of women and children. This has included the Domestic Violence and Family Protection Act 2017.

⁴ United Nations Human Rights Council, Nauru, *Ibid.*, n.2.

Lessons Learned

The following important lessons can be drawn from the sexual offences reform process in Nauru:

- **International Cooperation and Technical Assistance** - The importance of international cooperation cannot be overstated. Law reform is a complex and technical machine requiring experience and knowledge. By engaging with other countries or international organisations, those seeking reform can leverage the experience of countries that have implemented such changes and have a greater opportunity for success. Cooperation should not only be maintained in respect of the early stages of the process, but should also encompass the review and drafting of the legislation as well as the post-reform implementation. This ensures that all aspects of the reform are covered.
- **Constructive Engagement** - Early engagement with the public and key stakeholders is incredibly important, particularly when dealing with more controversial aspects of legislation that may face societal resistance or opposition. By engaging people in an open dialogue, early education regarding the need for change is enabled, resulting in a lower likelihood of opposition later.
- **Implementation Programmes** - As publicly acknowledged by the Nauru government as early as 2011, laws do not, in and of themselves, resolve human rights issues. Legal reform is only one aspect of a broader reform package that is necessary to effectively respond to sexual assaults and violations and to adequately protect people. Preventative measures, such as education initiatives and protective measures, and the implementation of counselling and crisis services, are of equal importance. The absence of such measures following the enactment of the Crimes Act 2016 in far-reaching terms seems therefore to have been a real lost opportunity to realise effective change and integrate a comprehensive state response to crime, particularly sexual assaults.
- **Monitoring and Evaluation** - The monitoring and evaluation of legislation over time is essential in order to ensure that the legislation can continue to meet its underlying objectives. Adequate data capture and relevant statistics are crucial to monitoring the effectiveness of criminal law reform.



Nauru

COUNTRY OVERVIEW

COUNTRY OVERVIEW

Location and Population

The Republic of Nauru is the world's smallest island country. Located in Oceania. Nauru is 21 square kilometres and located 53 kilometres south of the Equator.⁵

Nauru's population of approximately 9,692 people are 94.9 per cent Nauruan or part Nauruan. While English is widely understood, the native language is Nauruan, a distinct Pacific Island language. The Island has been inhabited for at least 3,000 years, originally by 12 Polynesian and Micronesian tribes. The Nauruan population is generally conservative and religious, with 93.7 per cent identifying as Protestant or Roman Catholic.⁶



Legal and Political System

Throughout the 19th century, Nauru was a German colony. It was subsequently granted to Britain, Australia and New Zealand as a trustee mandate following World War I. Australia was the primary administrator and, other than a brief occupation by Japan in World War II, Nauru remained an Australian protectorate until the middle of the 20th century.⁷ On 31 January 1968, Nauru gained its independence and became the world's smallest independent republic.⁸

⁵ Central Intelligence Agency, *The World Factbook – Nauru*, February 2019 (available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/nr.html>).

⁶ *The World Factbook, Nauru, Ibid.*, n.5.

⁷ *The Commonwealth, Nauru: History*, 2019 (available at: <http://thecommonwealth.org/our-member-countries/nauru/history>).

⁸ *The Commonwealth, Nauru, Ibid.*, n.7.

Nauru is a parliamentary republic.⁹ The Parliament, which holds legislative power, is elected every three years and appoints a President to the executive branch.¹⁰ Officially Nauru does not have a political party system; however informal coalitions typically form between members of Parliament.¹¹ The foundational legal document is the Constitution of Nauru ('Constitution'), which affords equal protection under the law and grants unalienable rights to all people in Nauru.¹² With respect to fundamental rights and freedoms, the Constitution guarantees rights to non-discrimination, life, liberty, privacy and family life, among others.¹³ Nauru has signed two, ratified one, and acceded to four international treaties regarding the protection of human rights.¹⁴ While signature does not bind Nauru to uphold the treaty obligations, it does require Nauru to in good faith refrain from acts that would defeat the purpose of the treaty.¹⁵ In April 2016, Nauru became a member of the International Monetary Fund ('IMF') and World Bank Group.¹⁶

Economy

The island is largely made of phosphate and the exportation of the mineral provided Nauru with a high gross domestic product ('GDP') per capita in the 1980s.¹⁷ Despite historic economic prosperity, phosphate reserves depleted significantly during the 1990s and 2000s, reducing Nauru's GDP significantly. Consequently, Nauru is now heavily reliant on foreign aid, particularly Australian aid which accounts for 25 per cent of the country's GDP.¹⁸ In 2001, Nauru opened an Australian immigration processing centre on its territory.¹⁹ The operation of the Regional Processing Centre ('RPC') is

⁹ The World Factbook, Nauru, *Ibid.*, n.5.

¹⁰ Constitution of Nauru, 29 January 1968; amended on 17 May 1968, 28 August 2009, 18 September 2015, 4 November 2016, and 10 May 2018; (available at: http://ronlaw.gov.nr/nauru_lpms/Links/constitution.html). An extract can be found at section 1a of the Annex.

¹¹ Government of the Republic of Nauru, Who Comprises Parliament? Undated (available at: <http://www.naurugov.nr/parliament-of-nauru/about-parliament/who-comprises-parliament.aspx>).

¹² Constitution of Nauru, *Ibid.*, n.10.

¹³ Constitution of Nauru, Part II, Nauru, *Ibid.*, n.10.

¹⁴ Government of Nauru, Nauru's World Bank and IMF Membership, undated (available at: http://www.naurugov.nr/media/53850/imf_world_bank_web_information_document_2017_3_28.pdf).

¹⁵ Dag Hammarskjöld Library, What is the difference between signing, ratification and accession of UN treaties? Undated (available at: <http://ask.un.org/faq/14594>).

¹⁶ Nauru's World Bank, *Ibid.*, n.14.

¹⁷ United Nations Women Asia and the Pacific, Nauru, undated (available at: <http://asiapacific.unwomen.org/en/countries/fiji/co/nauru>).

¹⁸ Australian Government Department of Foreign Affairs and Trade, Nauru Aid Program Performance Report 2017-2018, 26 September 2018 (available at: <https://dfat.gov.au/about-us/publications/Pages/nauru-aid-program-performance-report-2017-18.aspx>).

¹⁹ Parliament of Australia, The Pacific Solution revisited, September 2012 (available at: https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/2012-2013/pacificsolution).

COUNTRY OVERVIEW

a key sector of the Nauru economy providing government revenue and employment opportunities.²⁰ In 2016, Nauru and the RPC received strong criticism from the United Nations, media outlets and human rights organisations regarding the facility conditions for, and treatment of, asylum seekers.²¹

Relevant International Human Rights Commitments of Nauru

UNITED NATIONS HUMAN RIGHTS TREATY	DATE OF SIGNATURE (s) RATIFICATION (r) OR ACCESSION (a)
▪ Convention on the Rights of the Child	27 July 1994 (a)
▪ International Covenant on Civil and Political Rights	12 November 2001 (s)
▪ International Convention on the Elimination of All Forms of Racial Discrimination	12 November 2001 (s)
▪ Convention on the Elimination of All Forms of Discrimination against Women	23 June 2011 (a)
▪ Convention relating to the Status of Refugees	28 June 2011 (a)
▪ Convention on the Rights of Persons with Disabilities	27 June 2012 (a)
▪ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	26 September 2012 (r)

²⁰ Australian Department of Foreign Affairs and Trade, *Aid Program Performance Report 2012-13 Nauru*, 4 February 2014 (available at: <https://dfat.gov.au/about-us/publications/Pages/nauru-aid-program-performance-report-2012-13.aspx>).

²¹ United Nations High Commission for Refugees, Transcript: UNHCR's top Asia official briefs press on Australian offshore processing on Nauru, and UNHCR talks with Bangladesh and Myanmar, April 2018 (available at: <https://www.unhcr.org/uk/news/press/2018/4/5ac60a074/transcript-unhcrs-top-asia-official-briefs-press-australian-offshore-processing.html>); Human Rights Watch, *Australia: Appalling Abuse, Neglect of Refugees on Nauru*, 2 August 2016 (available at: <https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>).

Media

The Nauru Home Affairs Department and Government Information Office operate government-owned and run media outlets. There is no independent media outlet in Nauru²² and there are barriers in place to restrict the entry of the international media, thereby hampering independent news reporting from inside Nauru.²³ The Nauru Home Affairs Department manages the Nauru Media Bureau, which operates Radio Nauru, Nauru Television and the monthly Mwinen Ko Newspaper.²⁴ The Government Information Office publish a bulletin to report new legislation and government initiatives fortnightly.²⁵

²² United Nations Human Rights Council, *National report – Nauru*, A/HRC/WG.6/10/NRU/1, 5 November 2010 (available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/171/50/PDF/G1017150.pdf?OpenElement>).

²³ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, Recommendations 87.15-17, A/HRC/31/7, 16 December 2015 (available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/286/17/PDF/G1528617.pdf?OpenElement>).

²⁴ Pacific Media Assistance Scheme, *2013 State of Media & Communications Report – Nauru*, 2013 (available at: <http://www.abc.net.au/cm/lb/9269242/data/nauru%3A-state-of-the-media-report-data.pdf>.)

²⁵ The underdeveloped nature of media coverage on Nauru has impacted our ability to access local information.

REPUBLIC OF NAURU
COURT HOUSE



THE CRIMINAL CODE PRIOR TO THE REFORM

THE CRIMINAL CODE PRIOR TO THE REFORM

Colonial History of the Criminal Code

Prior to the 2016 reform, Nauru's governing Criminal Code was rooted in Commonwealth criminal precedents instituted by its colonial powers. In 1921, pursuant to the trustee mandate, the Laws Repeal and Adopting Ordinance Act 1922 repealed the prior German governing law and instituted the Queensland Criminal Code Act 1899 ('Queensland Code') supplemented by the Papau Criminal Code Amendment Ordinance 1907, as the governing Criminal Code.²⁶ The Papau Criminal Code Amendment Ordinance 1907 modified the application of the death penalty under the Queensland Code.²⁷

The Queensland Code is one of three codes, the remaining two being the Western Australia Criminal Code 1913 and Tasmania Criminal Code 1924, which collectively constitute the Griffiths Codes developed by Sir Samuel Walk Griffith.²⁸ The Griffiths Codes drew heavily from the criminal code drafted for Britain by Sir James Fitzjames Stephen.²⁹ As a result, the origins of Nauru's criminal code trace to two colonial powers; the United Kingdom and Australia.

Since its adoption and prior to Nauruan independence, six piecemeal amendments to the Criminal Code occurred.³⁰ Those amendments were minimal in scope and focused on offences against the person and administrative protocols.³¹ Under the Constitution, all laws in force immediately prior to Independence Day (31 January 1968), continued in force, including the Criminal Code.³²

²⁶ Pacific Islands Legal Information Institute, *Laws Repeal and Adopting Ordinance 1922 – 1936*, undated (available at: http://www.pacilii.org/nr/legis/num_act/lraao19221936270/).

²⁷ The Papau Criminal Code Amendment Ordinance 1907 impacted the application of the death penalty under the Queensland Code. In effect, the Papau Criminal Code Amendment Ordinance 1907 (i) repealed the death penalty as the punishment for murder in section 305; (ii) instituted imprisonment, with hard labor, for life as the punishment for murder; and (iii) allowed the court to show leniency and record a judgment of death on the record instead of pronouncing a sentence of death. Nauru Criminal Code 1899, 3 December 2011, Note 4-8. (available at: http://ronlaw.gov.nr/nauru_lpms/files/acts/7a6152bda0c095cb3b94813330d84b80.pdf). Extracts can be found at section 1b of the Annex.

²⁸ University of Tasmania Law Review, A. Hemming, *Why the Queensland, Western Australian and Tasmanian Criminal Codes are Anachronisms* [2012] UTasLawRw; (2012). 31(2). (available at: <http://classic.austlii.edu.au/au/journals/UTasLawRw/2012/10.html>).

²⁹ University of Queensland Law Journal, *Reflections on James Fitzjames Stephen*, 2010 (available at: <http://www.austlii.edu.au/au/journals/UQLawJ/2010/5.pdf>).

³⁰ Nauru Criminal Code 1899, *ibid.*, n.27.

³¹ Pacific Islands Legal Information Institute, *Nauru Alphabetical Index of Statutes in Force*, undated (available at: <http://www.pacilii.org/nr/indices/legis/nauru-alphabetical-index-of-statutes-in-force/alphabetical-index.html#CN1968>). The amendments include the repeal and insertion of provisions regarding procuring a girl or woman and procuring a girl or woman using substances in 1935; the modification and subsequent elimination of whipping as a punishment in 1952 and 1955; the provision of a pardon from the Administrator of Nauru in 1957; and the insertion of a provision regarding persons found in a dwelling house in 1960 - Nauru Criminal Code 1899, *ibid.*, n.30.

³² Constitution of Nauru, (available at: http://ronlaw.gov.nr/nauru_lpms/Links/constitution.html). An extract can be found at section 1a of the Annex.

Following independence, Nauru passed four further amendments to the Criminal Code prior to the comprehensive reform in 2016, but none of these changes addressed the provisions relating to sexual offences (*principally Chapter XXII*).³³ As a result, the sexual offences laws in Nauru prior to 2016 remained largely unchanged from the Queensland Criminal Code 1899 originally codified in Nauru in 1921 and adopted by the Republic of Nauru in 1968.

Due to its historic origins and the absence of modernisation, the law was generally seen as an inherited set of archaic provisions that did not accord with human rights, and was ill-equipped for modern interpretation and the prosecution of sexual offences.³⁴ Nauru recognised the shortcomings in their criminal law framework in their 2011 United Nations Human Rights Council Universal Periodic Review (‘UPR’) National Report (‘2011 National Report’).³⁵



Nauru UPR, 2011 National Report, 5 November 2010

Nauru’s criminal law already provides protection for the rights of accused persons, however it contains some anachronistic provisions dating back to 1899 that are inconsistent with certain human rights.

Sexual Offences in the Criminal Code

Chapters XXII (*Offences against Morality*), XXX (*Assaults*) and XXXII (*Assaults on Females*) of the Criminal Code included Nauru’s previous sexual offences provisions.³⁶ The distinct section on *Assaults on Females* included the sexual offences of rape and indecent assault.³⁷

Despite a multitude of sexual offence provisions, the Criminal Code did not provide satisfactory coverage of the range of sexual violations that women, men and children may experience. The differentiation between genders, particularly a lack of protection

³³ Nauru Criminal Code Amendment Act 1971, 20 December 1971 (available at: http://www.pacii.org/nr/legis/num_act/ccaa1971195/); Nauru Criminal Code (Amendment). Act 1972, 14 December 1972 (available at: http://www.pacii.org/nr/legis/num_act/ccaa1972195/); Nauru Criminal Code (Amendment). Act 1972, 14 December 1972 (available at: http://www.pacii.org/nr/legis/num_act/ccaa1972195/); Nauru Criminal Code (Amendment). Act 2006, 11 August 2006 (available at: http://www.pacii.org/nr/legis/num_act/ccaa2006195/); Nauru Gaming Act 2011, 3 November 2011 (available at: http://www.pacii.org/nr/legis/num_act/ga201166/).

³⁴ National report, Nauru, *ibid.*, n.22.

³⁵ National report, Nauru, *ibid.*, n.22.

³⁶ Nauru Criminal Code 1899, *ibid.*, n.27.

³⁷ Nauru Criminal Code 1899, *ibid.*, n.27.

THE CRIMINAL CODE PRIOR TO THE REFORM

for boys and men, discriminatory treatment of women and girls as compared to men and boys and overly vague or overly definitive descriptions of sexual offences, amongst other failings, created an inconsistent application of the Criminal Code and inhibited the law enforcement community from accurately and consistently prosecuting sexual crimes. In particular, the government acknowledged in their 2015 UPR national report ('2015 National Report') that the Criminal Code failed to capture a contemporary approach to sexual offences, specifically in addressing violence instigated by men against women.³⁸ The 2015 National Report also reflected on the structural difficulties with the Criminal Code, which had impacted upon the practical application of the law within the criminal justice system. For example, there had been challenges within the Nauru Police Force and the Office of Director of Public Prosecutions in applying appropriate charges for certain offences of violence against women.³⁹ The below provides more detail regarding deficiencies in Nauru's previous sexual offences legislation.

Gender

The Criminal Code instituted discriminatory treatment based on gender. Whilst it can be important to recognise the disproportionate impact of sexual offences on females, the existence of a distinct chapter with a different range of offences under *Assaults on Females* to criminalise rape and indecent assault on females failed to adequately protect genders equally, and allowed for discrepancy between punishments for assailants based on the victim's gender.

The *Assaults on Females* chapter included rape, attempt to commit rape, indecent assaults, abduction, and abduction of girls under seventeen.⁴⁰ By contrast, the general Assaults chapter did not include rape or abduction, but rather included provisions on common assault, assaults against specific victim classes (such as persons protecting wrecks), and specifically indecent assault on males or assault with intent to commit unnatural offences.⁴¹ As such, male victims did not have equal or adequate protection from sexual assaults or rape. While perpetrators of rape against a female victim faced life imprisonment, the maximum sentence for sexual assault perpetrated against a male victim was fourteen years pursuant to the provision that criminalised assault with intent to commit an unnatural offence.⁴² The unequal treatment of males and females likely failed to protect male victims (particularly boys).

Age

The Criminal Code inappropriately established different penalties for offences against girls of different ages, which decreased in severity as the age of the girl increased. For instance, section 214 (*Attempt to Abuse Girls under Ten*) was punishable by hard labour

³⁸ National report, Nauru, *Ibid.*, n.2.

³⁹ National report, Nauru, *Ibid.*, n.2.

⁴⁰ Nauru Criminal Code 1899, chapter XXXII section 347-353, *Ibid.*, n.27.

⁴¹ Nauru Criminal Code 1899, chapter XXXII section 335-340, *Ibid.*, n.27.

⁴² Nauru Criminal Code 1899, chapter XXXII section 336 & 348, *Ibid.*, n.27.

for fourteen years, but section 213 (*Defilement of Girls under Fourteen and of Idiots*) was punishable by imprisonment and hard labour for two years.⁴³

The variance in punishment in accordance with the age of the child failed to protect children regardless of age, contrary to Article 34 of the CRC which requires states to “protect the child from all forms of sexual exploitation and sexual abuse.”⁴⁴

Language

In addition to the gendered constructions of the sexual offences provisions, the Criminal Code maintained outdated language and terminology, which failed to reflect modern human rights standards. For example, section 215 (*Defilement of Girls under Fourteen and of Idiots*) defined the offence as an attempt to have unlawful carnal knowledge of a woman or girl known to be “an idiot or imbecile”.⁴⁵ The use of this language was debasing, degrading and failed to appropriately describe persons living with disabilities. It furthermore failed to comply with the accepted terminology in the United Nations Convention on the Rights of Persons with Disability (‘CRPD’) to which Nauru acceded in June 2012.⁴⁶ While the CRPD does not define disability, the preamble recognises that “disability is an evolving concept” and persons with disabilities pursuant to the CRPD may include individuals with “long-term physical, mental intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society.”⁴⁷

Aggravating factors

The sexual offences provisions in the Criminal Code failed to consistently recognise and define aggravating and contextual factors in a comprehensive and appropriate manner. The Criminal Code broadly defined ‘circumstances of aggravation’ as “any circumstance by reason whereof an offender is liable to a greater punishment,” but did not cite specific examples.⁴⁸ Regarding the specific sexual offences provisions, various circumstances were inconsistently identified as warranting greater punishment. For example, section 215 (*Defilement of Girls under Fourteen and of Idiots*) included a sub-provision for victims who were persons with disabilities; however no other provision addressed disability as an aggravating factor. Similarly, the inclusion of “any drug or intoxicating liquor” in section 218 (*Procuring girl or woman by drugs, etc.*) increased the

⁴³ Nauru Criminal Code 1899, chapter XXXII section 336 & 348, *Ibid.*, n.27

⁴⁴ United Nations Office of the High Commissioner on Human Rights, Convention on the Rights of the Child resolution 44 / 25, 20 November 1989, (available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>).

⁴⁵ Nauru Criminal Code 1899, *Ibid.*, n.27.

⁴⁶ United Nations Treaty Body Database, Ratification Status for Nauru, undated (available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=121&Lang=EN).

⁴⁷ United Nations – Disability Department of Economic and Social Affairs, Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities, undated (available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/frequently-asked-questions-regarding-the-convention-on-the-rights-of-persons-with-disabilities.html#sqc3>).

⁴⁸ Nauru Criminal Code 1899, section 1, *Ibid.*, n.27.

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punishment by three years in comparison to section 217 (*Procuring Girl or Woman*);⁴⁹ however, drugs and alcohol were not addressed in any other sexual offence provision. Comprehensive contextual factors are a critical component of any framework for sexual offences.

Consent

While some sexual offences provisions addressed the element of consent, this was not comprehensively defined, particularly in relation to the ability to give consent. Furthermore, the existence or lack of consent was not uniformly applied throughout the sexual offences. For example, section 347 (*Definition of Rape*) specified the act must be committed without consent or with consent obtained by force, but section 350 (*Indecent Assaults on Females*) made no reference to either concept.⁵⁰ The lack of a statutory definition of consent was yet another aspect where the Criminal Code failed to meet contemporary good practice standards in sexual offences laws.

Key Provisions

The following provides an outline of some of the key sexual offences provisions that existed in the Criminal Code.

Rape

Section 347 of the Criminal Code provided for the offence of rape.



Section 347 Assaults on Females

Any person who has carnal knowledge of a woman or girl, not his wife, 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 and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.

The formulation detailed above reflected the then English common law definition of rape.⁵¹ Under such definition, rape occurred when a man engaged in sexual intercourse with a woman not his wife, by force or fear, against her will and without her consent. Such formulation was problematic for several reasons. The definition excluded males and spouses as potential victims, and excluded sexual acts other than sexual intercourse. It reflected the historic conceptualisation of rape as “a theft of male property in female sexuality” intended to protect both a father of the value of

⁴⁹ Nauru Criminal Code 1899, section 217-218, *Ibid.*, n.27.

⁵⁰ Nauru Criminal Code 1899, section 347 & 350 *Ibid.*, n.27.

⁵¹ Bruce MacFarlane QC, Deputy Minister of Justice, Province of Manitoba, Historical Development of the Offence of Rape, undated (available at: <https://archive.org/stream/413655-hist-devel-of-offence-of-rape/413655-hist-devel-of-offence-of-rape.djvu.txt>).

his transferable asset, his daughter,⁵² and a husband from a loss of exclusive conjugal rights.⁵³ Married women were seen as property of their husbands and thus could not be raped by their husbands. This comprehensively failed to recognise and protect the physical and sexual integrity of the victim.

Furthermore, there was a lack of protection for male victims of rape within the Criminal Code. The primary provision that could be invoked was that of indecent assault (section 337), which was only a misdemeanour and often did not capture the seriousness of the offence committed.⁵⁴ In addition, the assault with intent to commit unnatural offence provision (section 336) captured attempted sexual assaults against male and female victims and applied a more severe punishment.⁵⁵ However, the “unnatural offence” element reinforced an antiquated view of same-sex intimacy.

Moreover, nowhere in the Criminal Code was “carnal knowledge” defined other than section 6, which stated that the element was complete upon penetration. Penetration was interpreted to exclusively include penile penetration of the vagina.⁵⁶ Such narrow interpretation meant that penetration by an object or anal penetration were not captured under this provision. Regarding sentencing, no minimum sentences were provided for as the court retained discretion as to the “proper” sentence.⁵⁷

Indecent assault

Section 337 and 350 of the Criminal Code separately criminalised indecent assaults on males and females respectively. The provisions lacked any definition of “indecent assault”. While both offences were categorised as misdemeanours, indecent assaults on males were punishable by three years of imprisonment whereas indecent assault on females were punishable by only two years of imprisonment. The disparity in sentencing reinforced the discriminatory treatment of men and women. In addition, as the indecent assault provision could be applied to a range of sexual violations not involving penile penetration, the misdemeanour classification likely failed to recognise the serious nature of certain sexual crimes.⁵⁸

⁵² Mary Heath, Patricia Eastaale (ed), *Balancing the Scales: Rape, LawReform and Australian Culture*, ‘Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape’, 1998 13, 16. (available at: <http://www5.austlii.edu.au/au/journals/AltLawJl/1999/68.pdf>).

⁵³ Susan McCoin, *Women’s Rights Law Reporter*, *Law and Sex Status: Implementing the Concept of Sexual Property*, 1998, pg 237-243, (available at: https://heinonline.org/HOL/Page?handle=hein.journals/worts19&div=26&g_sent=1&casa_token=&collection=journals).

⁵⁴ Nauru Criminal Code 1899, section 337, *ibid.*, n.27.

⁵⁵ Nauru Criminal Code 1899, section 336, *ibid.*, n.27.

⁵⁶ HDT Interview conducted on 23 January 2019.

⁵⁷ Nauru Criminal Code 1899, section 650, *ibid.*, n.27.

⁵⁸ Human Rights Watch, *This alien legacy: the origins of ‘sodomy’ laws in British colonialism*, 2013 (available at: <https://www.jstor.org/stable/j.ctv512st2.7?seq=1#metadata.info.tab.contents>).

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Child sexual offences

Chapter XXII included seven provisions criminalising “*indecent treatment*”; “*defilement*”; and “*abuse*” of boys and girls, differentiating between age groups and genders.⁵⁹ The construction of these provisions included different penalties for offences against girls, penalties that decreased as the age of the victim increased and failed to recognise the seriousness of non-penetrative sexual assaults. Structuring assaults against children in this manner failed to consider the range of violations and harmful contexts of sexual assaults against girls and boys.⁶⁰

Collectively, sections 210, 212 to 216 and 350 criminalised indecent treatment of boys under fourteen and defilement, abuse, indecent treatment, or assault of girls under ten, twelve, fourteen or seventeen with varying degrees of seriousness. The defilement of boys was not criminalised in any section and all the defilement provisions required penetration under the definition of “carnal knowledge.”⁶¹ The successive provisions relating to child sexual abuse and exploitation created overlapping categories, yet simultaneously failed to comprehensively protect entire adolescent populations.

Incest

Sections 222 and 223 distinguished between incest committed by a male and an adult female. The provisions only criminalised a male committing incest against a female family member and an adult female committing incest with her male relatives (should she be found to have knowingly permitted them to have carnal knowledge of her). Not only did these provisions contain different conduct and knowledge requirements for an offence to be committed depending on the gender of the perpetrator, they also entirely failed to capture incestual sexual relations between members of the same sex.



Section 222, Incest by a man, Criminal Code 1899

Any person who carnally knows a woman or girl who is, to his knowledge, his daughter or other lineal descendant, or his sister, is guilty of a crime, and is liable to imprisonment with hard labour for life.



Section 223, Incest committed by an adult female, Criminal Code 1899

Any woman or girl of or above the age of eighteen years who permits her father or other lineal ancestor, or her brother, to have carnal knowledge of her, knowing him to be her father or other lineal ancestor, or her brother, as the case may be, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

⁵⁹ Nauru Criminal Code 1899, Chapter XXII, *ibid.*, n.27.

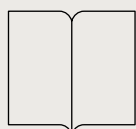
⁶⁰ Christine Forster, *Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards*, 2009 (available at: <http://www5.austlii.edu.au/au/journals/MelbULawRw/2009/28.html>).

⁶¹ Nauru Criminal Code 1899, section 6, *ibid.*, n.27.

Coercion by the father or other lineal ancestor, or brother, was a defence for an adult female charged with incest. The contrasting language in sections 222 and 223 prevented a male from presenting coercion by the other family member as a defence. Furthermore, the punishments for incest drastically increased if the perpetrator was male creating an inequitable application based on gender. Incest committed by a male resulted in life imprisonment whereas a female only faced three years imprisonment. The specific definitions of lineal relations as perpetrators of incest also failed to consider the wider family unit or modern family constructions.

Unnatural offences

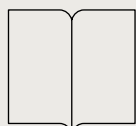
Sections 208, 209 and 211 of the Criminal Code respectively criminalised and penalised consensual same-sex sexual acts between males as “Unnatural Offences,” “Attempt to commit Unnatural Offences” and “Indecent Practices between Males.”



Section 208 Unnatural Offences, Criminal Code 1899

Any person who: (1) Has carnal knowledge of any person against the order of nature; or (2) Has carnal knowledge of an animal; or (3) Permits a male person to have carnal

knowledge of him or her against the order of nature; is guilty of a crime and is liable to imprisonment with hard labour for fourteen years.



Section 211, Indecent Practices between Males, Criminal Code 1899

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross

indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private.

Sections 208 and 209 did not define “carnal knowledge” of any person “against the order of nature” but it is generally accepted that this provision captured anal intercourse (either between two men or between a man and a woman) and non-penile vaginal intercourse between a man and a woman.⁶² There was no requirement for lack of consent or use of force. Moreover, sections 208 and 209 equated consensual same-sex intimacy with bestiality. Similarly, what constituted an “act of gross indecency” under section 211 was not outlined.

The law on its face was gender neutral in application but, as is the case in many parts of the world, such laws disproportionately impact the lives of gay men and LGBT persons more generally. Although we found no evidence of the offences being enforced against individuals for private consensual same-sex sexual acts, or that the discrimination of LGBT persons is pervasive within Nauruan society, the existence of this law had the propensity to reinforce stigma and discrimination against LGBT

⁶² Nauru Criminal Code 1899, section 208-220, *Ibid.*, n.27

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people.⁶³ In a statement to the UN Human Rights Council, the International Lesbian and Gay Association harshly criticised sections 208, 209 and 211 of the Criminal Code because, regardless of whether the laws were enforced, they had a real effect by impeding an individual's right to privacy and increasing violence and discrimination.⁶⁴

The international community more widely voiced its concerns, principally through the UPR process, and in 2011 Nauru accepted recommendations to decriminalise sexual activity in private between consenting adults of the same sex.⁶⁵

Additional deficiencies

Criminal Procedure

Aspects of Nauru's former criminal procedure rules also treated women and girls in a discriminatory manner, which hindered the prosecution of sexual offences. Previously the accused could not be convicted of a sexual offence based upon the "uncorroborated testimony of one witness" where the victim was female.⁶⁶

In 2015, however, the Supreme Court of Nauru formally removed the corroboration rule in *The Republic v Saeed Mayahi*.⁶⁷ The question the court had to determine was whether "the practice of the Courts requiring a corroboration warning for the evidence of women or girl victims relating to sexual offences" was contrary to Nauru's Constitution. The court answered the question in the affirmative, holding that the corroboration rule was discriminatory on the basis of sex.⁶⁸ Significantly, the court considered Nauru's ratification of the Convention on the Elimination of all forms of Discrimination against Women ('CEDAW') and being a signatory to the International Covenant on Civil and Political Rights (ICCPR) in formulating its judgment.⁶⁹



The existence of the law automatically places LGBT persons on the island in a more vulnerable situation with regard to violence, being less willing to go to the police for protection or investigation when they themselves would then be open to scrutiny. It also sets the tone for more general discrimination to take place in people's daily lives. The government has a responsibility to help bring about change on the island, and that includes repealing the law.

Andre du Plessis,
International Lesbian and Gay Association,
Statement to 31st Human Rights Council session,
16 March 2016

⁶³ Kaleidoscope Australia, Submission to the UN Universal Periodic Review regarding the protection of the rights of LGBTI persons in Nauru, March 2015 (available at: https://www.upr-info.org/sites/default/files/document/nauru/session_23_-_november_2015/kahrif_upr23_nru_e_main.pdf).

⁶⁴ Andre du Plessis, International Lesbian and Gay Association, Statement to 31st Human Rights Council session, 16 March 2016, (available at: https://www.upr-info.org/sites/default/files/document/nauru/session_23_-_november_2015/international_lesbian_and_gay_association_oral_statement_nauru_2016.pdf).

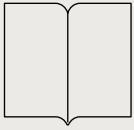
⁶⁵ United Nations Human Rights Council, Report of the Working Group on the Universal Periodic Review: Nauru, para. 31, A/HRC/17/3, 30 May 2011 (available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/116/35/PDF/G1111635.pdf?OpenElement>).

⁶⁶ Nauru Criminal Code 1899, *Ibid.*, n.27.

⁶⁷ *Republic v Mayahi* [2015] NRSC 15, 5 August 2015, para 23 (available at: <http://www.pacii.org/nr/cases/NRSC/2015/15.html>).

⁶⁸ United Nations Human Rights Council, para. 30-32, *Ibid.*, n.2.

⁶⁹ *Republic v Mayahi*, para 3, *Ibid.*, n.67.



Republic v Mayahi [2015] NRSC 15, 5 August 2015, para. 23

The rule of practice requiring the giving of a corroboration warning relates to cases in this jurisdiction in which only a woman or girl can be the complainant. Thus to require

a corroboration warning to be given in relation to these complainants only, is to discriminate against them on the basis of their sex.

In conjunction with the Criminal Code, Nauru's criminal procedure legislation was also reformed and in May 2016 the Criminal Procedure (Amendment) Act was enacted in order to promote a more effective and efficient process regarding the criminal justice system of Nauru.⁷⁰

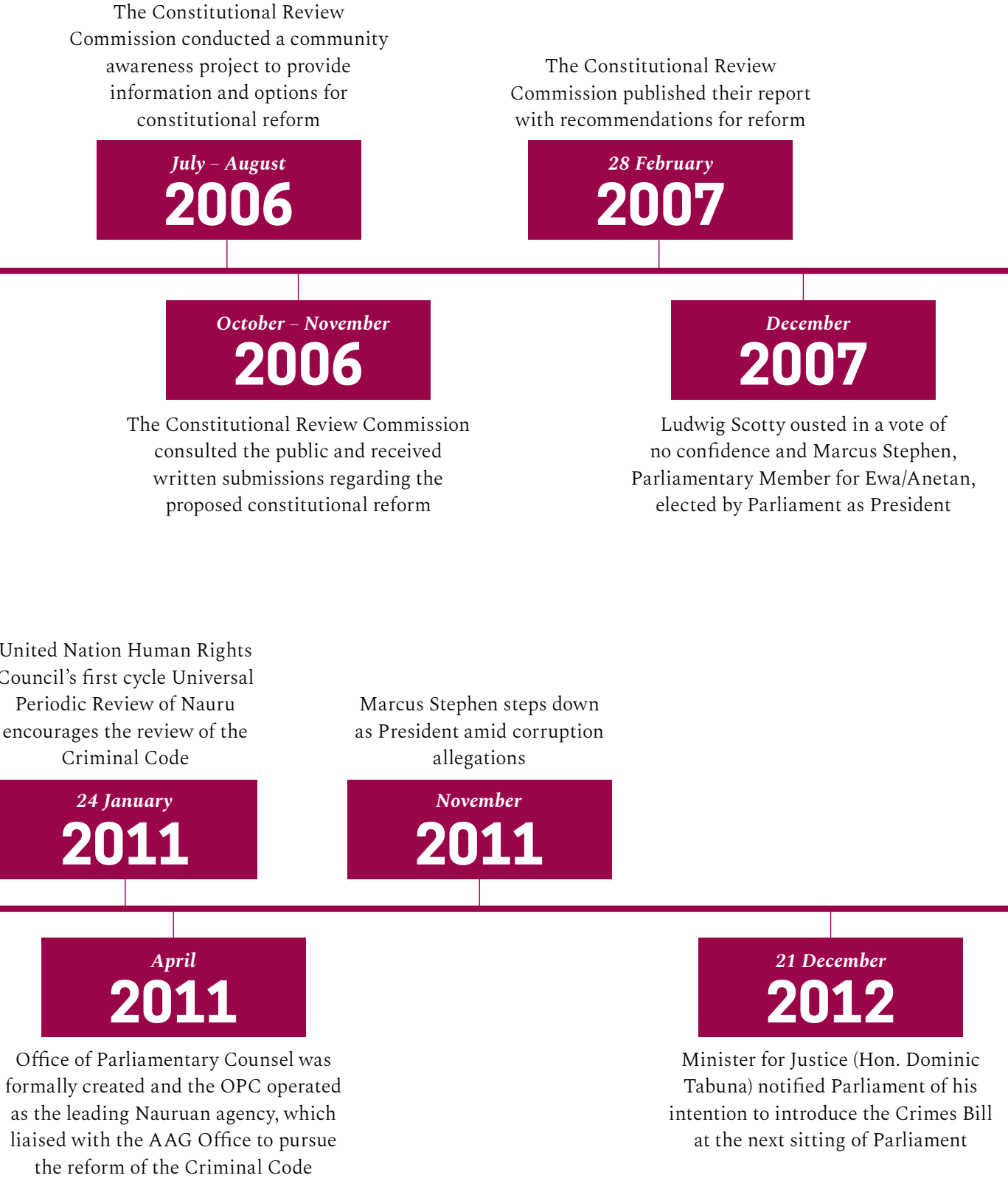
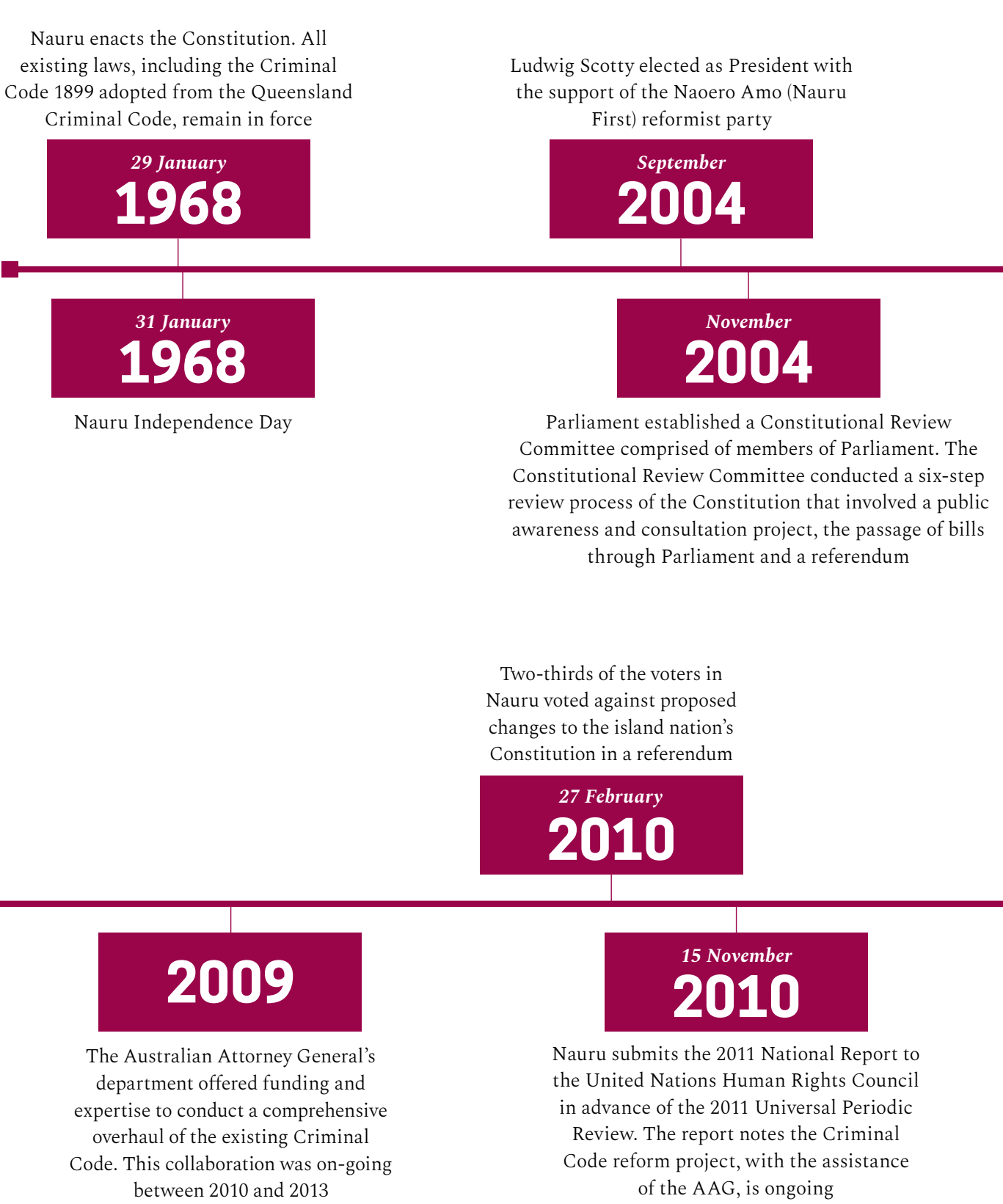
⁷⁰ Republic of Nauru, *Nauru Bulletin: Parliament passes laws including new Act*, 27 May 2016 (available at: http://www.naurugov.nr/media/47055/nauru_20bulletin_20_05_27may2016_20_28137_29.pdf).



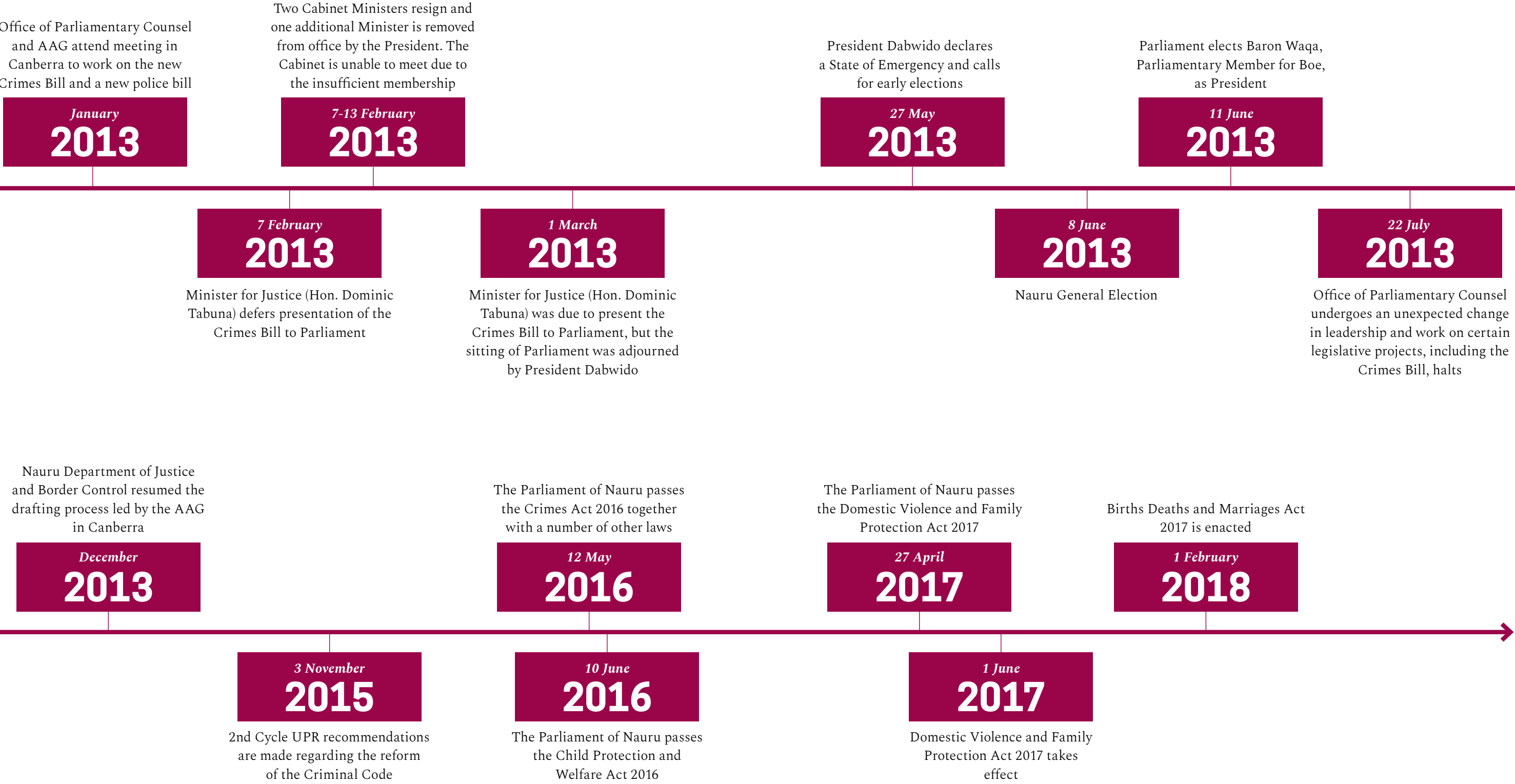
CHRONOLOGY OF LEGISLATIVE REFORM

CHRONOLOGY OF LEGISLATIVE REFORM

The following provides a timeline of key events and activities relating to the sexual offences reform in Nauru.



CHRONOLOGY OF LEGISLATIVE REFORM





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The combined efforts of dedicated individuals in Nauru and committed international expertise created the necessary environment and opportunity for comprehensive reforms to Nauru's Criminal Code. The local stakeholders included a new reformist government focused on modernising Nauru's legislation, the Office of Parliamentary Counsel who was engaged to assist with drafting the new legislation, and the Nauru Department of Justice and Border Control who all collaborated together with the AAG to completely overhaul the Criminal Code. The overarching aim of the reforms was to create an effective body of legislation which Nauru had independent ownership over.

New Reformist Government

The development of political groups committed to modernising Nauru's policies and legal frameworks within the government fostered an environment open to comprehensive legislative reform.

In 2003, the Nauru First ('Naoero Amo') political party was formed, with a reformist agenda and legislative goals. While Nauru does not officially have political parties and all members of Parliament are elected as independents, it is not unusual for groups and affiliations to form.⁷¹ Members of the Nauru First group were first elected in the May 2003 elections, but lost power in August 2003 as a result of a vote of no-confidence.⁷² In September 2004, Nauru Amo regained control of Parliament and elected Ludwig Scotty as President ('Scotty government').⁷³ The Nauru First group remained fluid and the coalition was subject to change, but the group's creation initiated a period of relative stability from 2004 to early 2013, which enabled the government to pursue Constitutional reform and other legal and policy changes.⁷⁴

In 2007, President Ludwig Scotty was replaced by President Marcus Stephens ('Stephens government'), but the new government recognised the achievements by the prior government and retained a commitment to "the fundamental principles of democracy, good governance and sound socio-economic policies."⁷⁵ The Stephens government retained the support of the reformist members of Parliament.⁷⁶



Our national sustainable development strategy was initiated by our Government and given one of its fundamental goals: the establishment and operation of a transparent and accountable Government.

United Nations General Assembly, Address by Mr. Ludwig Scotty, President of the Republic of Nauru, 27 September 2007

⁷¹ Republic of Nauru, *Ibid.*, n.11.

⁷² The Commonwealth, *Nauru: Constitution & Politics*, 2019 (available at: <http://thecommonwealth.org/our-member-countries/nauru/constitution-politics>).

⁷³ Nauru: *Constitution & Politics*, *Ibid.*, n.72.

⁷⁴ HDT Interview conducted on 18 June 2018.

⁷⁵ United Nations General Assembly, *Address by Mr. Marcus Stephen, President of the Republic of Nauru*, 24 September 2008 (available at: <https://www.un.org/en/ga/63/generaldebate/nauru.shtml>).

⁷⁶ Pacific Islands Forum Secretariat, *Report of the Pacific Islands Forum Election Monitoring Mission to Nauru April- May 2008*, 1 May 2008, (available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.729.4928&rep=rep1&type=pdf>).

The political will and reformist climate in government were likely influential factors in the success of the comprehensive reform of the Criminal Code. While the reform of the Criminal Code was not initiated until 2009, there was an atmosphere for, and commitment to, legislative reform, which had been initiated under the Scotty Government with the launch of a constitutional review process in 2004.⁷⁷

A Constitutional Review Committee, comprised of members of Parliament, was established in 2004 and by 2006 a comprehensive review of the constitution had been designed. The review process included a public awareness and consultation project, publication of a report proposing reforms,⁷⁸ the passage of bills by Parliament and a referendum.⁷⁹ The proposed changes to the Constitution included, amongst other matters, changing the method of electing the President: from election by Parliament to direct popular election, and adding new rights protections to the existing bill of rights. Amongst the reformed rights was an amended right to equality, which would have provided for non-discrimination on the basis of gender and sexual orientation, and new rights to privacy, information, access to education and specific children's rights.⁸⁰ All of these changes required approval via referendum before they could take effect.

Whilst Parliament passed all of the recommendations, certain bills, which required adoption by a public referendum, failed to achieve the necessary support of two-thirds of voters.⁸¹ This occurred despite the fact that prior to the referendum, a large-scale public awareness and public consultation occurred with "forty public consultation meetings around Nauru" and the opportunity for the public to submit written submissions.⁸² Given the level of public awareness and consultation, the rejection by the electorate could be seen as demonstrating a worrying lack of support for legislative change.

Nevertheless, despite the partial failure of the constitutional review process, the experience provided valuable lessons and the reformist governments were

⁷⁷ Republic of Nauru, *Constitutional Review Project*, undated, (available at: <http://www.naurugov.nr/parliament-of-nauru/projects/constitutional-review-project.aspx>).

⁷⁸ Constitutional Review Commission, *Naoero Ituga Report*, 28 February 2007 (available at: http://www.pacii.org/nr/other/Nauru_Constitutional_Review_Commission_Report_28Feb07.pdf).

⁷⁹ Constitutional Review Project, *Ibid.*, n.77.

⁸⁰ Parliament of Nauru Draft Constitution, 24 November 2009 (available at: http://www.naurugov.nr/media/16472/constitution_with_proposed_amendments_marked_24nov09.pdf).

⁸¹ Constitutional Review Project, *Ibid.*, n.77.; Pacific Island News Association, Nauruans vote against proposed Constitutional Amendments, 1 March 2010 (available at: <http://www.pina.com.fj/?p=pacnews&m=read&o=3824357504b8aea28cfbffd5c07e>).

⁸² Constitutional Review Project, *Ibid.*, n.77.

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undeterred and continued pursuing progressive legislation and policy reform. For example, in April 2011, the Office of Parliamentary Counsel was created⁸³ to spearhead legislative drafting and commitments were made to modernise the Criminal Code.

Following a period of political instability in 2011, there was a change of government in June 2013.⁸⁴ The changes in government resulted in a brief hiatus in the reform of the Criminal Code and increased concerns from within and outside Nauru as to the preservation of the rule of law in the country. From 2013 to 2015, the Nauruan government allegedly dismissed five ministers from Parliament for vocalising opposition to the ruling party and arbitrarily removed the Chief Justice without due process.⁸⁵ Despite the concerning trends with respect to the rule of law, the Crimes Act 2016 was passed, which may indicate a general political will across the spectrum to usher in a new criminal law framework. However, there was also mounting pressure from the international sphere to address the human rights and rule of law concerns⁸⁶ and the modernisation of the Criminal Code to some extent reflected a positive step in addressing such concerns.

Engagement of State Agencies - Office of Parliamentary Counsel and Department of Justice & Border Control

The *Legislation Publication Act of 2011*, enacted by the Parliament on 15 April 2011, created the Office of Parliamentary Counsel ('OPC') for the express purpose of drafting legislation.⁸⁷ Prior to the statutory creation of the OPC, legislative drafting was handled by an informal version of a parliamentary counsel.⁸⁸ The role was variously titled 'Legislative Counsel,' 'Parliamentary Counsel' and 'Legal Draftsman' and responsibilities differed, including during periods where the position had no responsibility for legislative drafting.⁸⁹

At the direction of Parliament, the OPC operated as the leading Nauruan agency liaising with the AAG to pursue the reform of the Criminal Code.⁹⁰ The OPC formed

⁸³ Nauru Legislation Publication Act 2011, 15 April 2011, Part 3, (available at: http://ronlaw.gov.nr/nauru_lpms/files/acts/04bdcee21c2e1482bb9200a80a55e747.pdf).

⁸⁴ Republic of Nauru, *Baron Waqa elected new president 11 June 2013*, 11 June 2013, (available at: <http://www.naurugov.nr/government-information-office/media-release/baron-waqa-elected-new-president.aspx>).

⁸⁵ Amnesty International, *Nauru: Weakening Human Rights Protections and the Rule of Law*, 2015 (available at: <https://www.amnesty.org/download/Documents/ASA4222792015ENGLISH.pdf>).

⁸⁶ Australian National University, *Australia and New Zealand urged to take action over Nauru rights*, 29 July 2015 (available at: <https://law.anu.edu.au/news-and-events/news/australia-and-new-zealand-urged-take-action-over-nauru-rights>).

⁸⁷ Nauru Legislation Publication Act 2011, *Ibid.*, n.83.

⁸⁸ Office of Parliamentary Counsel, *Annual Report 2010 – 2011*, 31 October 2011 (available at: http://www.naurugov.nr/media/15791/opc_annual_report_2011.pdf).

⁸⁹ Office of Parliamentary Counsel, *Annual Report 2010 – 2011*, *Ibid.*, n.88.

⁹⁰ HDT Interview with former member of the Australian Attorney General Office conducted on 2 August 2018.

the centre of the Nauru policy team, which reviewed and discussed policy options with the AAG. The OPC (under previous guises) initiated collaboration with the AAG on the review of the Criminal Code in 2009 with the collaboration on-going between 2010 and 2013.⁹¹ The OPC therefore appears to have been instrumental in the development of the new criminal law framework; without the commitment of on-the-ground assistance and local knowledge provided by the OPC, it is unlikely that the reform would have progressed.⁹²

The OPC consisted of two to three lawyers for the duration of the department's existence, which potentially created serious human resource constraints with respect to drafting.⁹³ The establishment of the OPC, whilst limited in resource, was a positive and important step, as there were dedicated personnel focused solely on legislative review and reform.⁹⁴ In 2013, regrettably the OPC was abolished and the Department of Justice and Border Control ('DJBC') assumed all responsibilities for drafting and reforming legislation.⁹⁵

The DJBC, led by Honourable David Adeang, reignited the reform of the Criminal Code in 2014⁹⁶ by continuing the OPC's previous liaison with the AAG in Canberra to conclude the drafting and coordinate the passage of the legislation through Parliament. The DJBC oversaw the final steps necessary to make the seven year-long reform process a reality.

Regional Technical Legal Assistance

The AAG provided the resources and expertise to support Nauru to execute the reform of the Criminal Code.⁹⁷ Although there were committed personnel on the ground in Nauru dedicated to the Criminal Code review, they were very limited in terms of numbers and Nauru simply did not possess the human capital and the required technical expertise to execute a wholesale review and reform of an entire criminal code on its own – a significant undertaking. The AAG's support was therefore crucial and welcomed.

⁹¹ Office of Parliamentary Counsel, *Annual Report 2010 – 2011*, *Ibid.*, n.88.; Office of Parliamentary Counsel, *Annual Report 2011 – 2012*, 30 November 2011 (available at: http://www.naurugov.nr/media/18350/opc_annual_report_2012_-_v2_30nov12.pdf); Office of Parliamentary Counsel, *Annual Report 2012 – 2013*, 20 August 2013 (available at: http://www.naurugov.nr/media/31478/opc_annual_report_2013.pdf).

⁹² HDT Interview with former member of the Australian Attorney General Office, *Ibid.*, n.90.

⁹³ Office of Parliamentary Counsel, *Annual Report 2012 – 2013*, *Ibid.*, n.91.

⁹⁴ Pacific Islands Forum Secretariat, *Shaping laws in the Pacific – The role of legislative drafters*, 2013 (available at: http://www.pilonsec.org/images/stories/32nd/pifs_shapinglaws_report.pdf).

⁹⁵ Pacific Islands Law Officers Network, *Nauru Country Report*, November 2014 (available at: <http://www.pilonsec.org/images/stories/Nauru.pdf>).

⁹⁶ HDT Interview, *Ibid.*, n.56.

⁹⁷ HDT Interview with former member of the Australian Attorney General Office, *Ibid.*, n.90.

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UN Human Rights Council, *National report – Nauru, 5 November 2010*

With assistance from the Australian Attorney-General's Department, Nauru is currently undertaking a major review of the Criminal Code, with the aim of introducing

a modernised criminal code that is appropriate for Nauru and which accords with the Universal Declaration on Human Rights.

The AAG has a history of providing legislative drafting assistance throughout the Pacific region, with particular emphasis on strengthening criminal policies and procedures. The office also has extensive experience in providing strategic and technical assistance in strengthening the policy skills of Pacific law and justice officers. The AAG operates a multitude of assistance programmes that target legislative reform. For example, the AAG's Pacific Law and Justice Programme specifically aims to enhance criminal and policing frameworks in the Pacific by supporting the development and implementation of laws that respond to law and justice priorities.⁹⁸

Some examples of the technical assistance that the AAG has been involved in across the Pacific are noted below.

The AAG assisted the Cook Islands with a review of the Crimes Act 1969. This was a similar process to that undertaken by the AAG in Nauru with the “development of issues papers, drafting instructions and draft legislation.”⁹⁹

Kiribati undertook a reform of their police legislation and, with help from the AAG, developed and implemented the *Police Service Act 2008* and *Police Powers and Duties Act 2009*.¹⁰⁰

In Papua New Guinea, the AAG provided legislative analysis and mentorship to the Papua New Guinea Department of Justice and the Attorney General, particularly in respect of Papua New Guinea's legal framework on illegal drugs and precursor chemicals.¹⁰¹

In collaboration with the Australian Federal Police and New Zealand Police, the AAG supported the reform of police legislation in Tonga – the *Tonga Police Act 2010*.¹⁰²

⁹⁸ Australian Government Attorney-General's Department, *Pacific law and justice program*, undated (available at: <https://www.ag.gov.au/Internationalrelations/pacific-law-justice-program/Pages/default.aspx>).

⁹⁹ Pacific Island Law Officer Network, *Technical Legal Assistance: Country Specific Projects*, July 2013 (available at: http://www.pilonsec.org/images/stories/Documents/country_specific_databasev305jul2013.pdf).

¹⁰⁰ *Technical Legal Assistance*, *Ibid.*, n.99.

¹⁰¹ *Technical Legal Assistance*, *Ibid.*, n.99.

¹⁰² *Technical Legal Assistance*, *Ibid.*, n.99.



The Australian Government has been in discussions with the Government of Nauru about re-engaging on Criminal Code reform. We will continue to look for opportunities to work with Nauru - through bilateral and multilateral channels - to combat discrimination and promote the human rights of all people, regardless of their sexual orientation or gender identity. Australia remains a global advocate of non-discrimination on the basis of sexual orientation.

Julie Bishop, Former Australian Foreign Minister, reported by Kaleidoscope Australia 19 March 2014

Kaleidoscope Australia, Press Release - Kaleidoscope Australia notes changing climate for international human rights for LGBTI people, 19 March 2014

My country is committed to promoting human rights for its people and continues to participate in both domestic and international fora with the aim of achieving these objectives.

Hon. Ms Marlene Moses, Permanent Representative of Nauru to the UN, *Presentation of the State Response to the 2011 UPR*, 7 June 2011

The AAG continues to support legislative reform throughout the Pacific region.

In relation to Nauru, the assistance provided by the AAG was critical for the comprehensive overhaul of the Criminal Code. The AAG provided foundational knowledge, institutional expertise and human resources throughout the duration of the reform of the Criminal Code. At the outset, the AAG worked with the OPC to conduct a thorough review of the existing Criminal Code, to generate policy papers to identify provisions for reform and to draft the Crimes Act 2016.¹⁰³ At the same time as supporting the reform of the Criminal Code, the AAG also worked closely with government lawyers and the Nauru Police Force to reform the *Police Force Act 1972*.¹⁰⁴

Importantly, in providing technical assistance, the AAG does not operate in silo it undertakes the technical work of legislative drafting but it is always “supplemented by in-country visits to consult with the government lawyers and relevant ministry officials.”¹⁰⁵ In particular, in late January 2013, the officers at the OPC visited Canberra to work with the AAG on the new Crimes Bill 2016 (‘Crimes Bill’) and a new police bill for Nauru.¹⁰⁶ This demonstrates the cooperative and advisory nature of the relationship between the Australian and Nauruan governments.

Moreover, we cannot discount the bi-lateral influence of Australia on encouraging the reform process and the final adoption of the Crimes Act 2016 given Australia’s interests, objectives and involvement in Nauru.

In light of the overhaul of the Criminal Code being such a significant undertaking and a landmark piece of legislation, the AAG’s role was therefore undoubtedly critical to the entire reform process.

International Supervision and Fulfilling International Commitments

At the international level, Nauru has made long-standing commitments to promoting human rights. The country has ratified numerous international human rights conventions and treaties and, in doing so, has made international commitments and publicly spoken of the value it places on international participation.¹⁰⁷

It is no surprise therefore that Nauru has sought to implement the international human rights conventions that it has signed up to and the recommendations it has

¹⁰³ HDT Interview with former member of the Australian Attorney General Office, *Ibid.*, n.90.

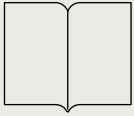
¹⁰⁴ *Technical Legal Assistance*, *Ibid.*, n.99.

¹⁰⁵ Pacific Islands Forum Secretariat, *Shaping laws in the Pacific*, *Ibid.*, n.94.

¹⁰⁶ Republic of Nauru, *Crimes Bill*, undated (available at: <http://www.naurugov.nr/parliament-of-nauru/news-events/archive/crimes-bill.aspx>). An extract can be found at section 1d of the Annex.

¹⁰⁷ United Nations Human Rights Council, para 28, *Ibid.*, n.2; Republic of Nauru, *Statement by HE Ms Marlene Moses, 17th Session of Human Rights Council*, 7 June 2011 (available at: https://www.upr-info.org/sites/default/files/document/nauru/session_10_-_january_2011/nauruplenarystatement2011.pdf).

DRIVERS OF REFORM



Government of Nauru, 2nd Cycle UPR, 14 March 2016 (Nauru - Addendum)

The Government of Nauru is committed to ensuring that the treaties ratified particularly CRC, CEDAW and CRPD are incorporated in national laws. To this end, the Government

of Nauru is working with relevant government departments and offices to ensure that principles contained in ratified treaties are incorporated in national police and laws.

received (markedly in respect of the CRC and CEDAW), and that it has engaged more generally at the international level.¹⁰⁸ All of this has played an important influencing role in Nauru's legislative reform efforts over the last two decades, and importantly in respect of the reform of the Criminal Code.

International Human Rights Treaties Commitments



Hon. Ms Marlene Moses, Permanent Representative of Nauru to the UN, Presentation of the State Response to the 2011 UPR, 7 June 2011

The UPR process has enabled Nauru to review its human rights situation and engage stakeholders and members of the international community with shared objectives. Our

commitment is reaffirmed through Nauru's acceptance of the majority of the recommendations.



Hon. Marcus Stephen, former President of Nauru, (Pacific Scoop, 7 December 2009)

CEDAW enables the full and complete development of a country through maximum participation of women on equal terms with men in all fields.

The CEDAW Committee highlighted the Criminal Code as a key piece of legislation that required reform in order to bring Nauru's laws into conformity with its treaty obligations. In particular, in June 2016¹⁰⁹ the CEDAW Committee highlighted the following issues, amongst others, regarding Nauru's criminal law framework that needed to be incorporated into the new crimes act:

- The definition of the crime of rape requiring reform in terms of scope and the abolition of the marital rape exemption;
- Provisions for sexual assault offences to be graded on the basis of seriousness with regards to the victim;
- Aligning the age of a child with CRC and CEDAW to be a person under 18;

¹⁰⁸ Republic of Nauru, Nauru Bulletin: Nauru consultations for UPR shadow report, 20 March 2015 (available at: http://www.naurugov.nr/media/53278/nauru_bulletin_03_20mar2015_121_.pdf).

¹⁰⁹ In January 2016 Nauru submitted an initial and second periodic report. CEDAW published the corresponding considerations of the reports in June 2016. Despite the publication after the passage of the Crimes Act 2016, the report relied on information predating the Crimes Act 2016.

- Reviewing the current sentencing and sanctions regime; and
- Incorporation of a domestic violence offence, which previously did not exist.¹¹⁰

In 2015, Nauru acknowledged the significance of compliance with CEDAW, the CRC and its other human rights treaty obligations as a motivating factor behind their review and reform of the Criminal Code and committed itself to achieving that end.¹¹¹



Nauru UPR, National Report, 14 October 2015

It is envisaged that all of the existing gender distinctions and discriminatory provisions will be removed in the new Code. The passage of this important law reform through

Parliament will allow for and ensure compliance with the obligations of CEDAW.

UN Universal Periodic Review



The UPR, which is implemented through the United Nations Human Rights Council's ('HRC'), was created in 2006 as a mechanism to review the human rights records of all United Nations member states and to allow member States to report actions taken to improve human rights in their respective countries.¹¹² Nauru has engaged in the UPR process and has participated in two cycles; in 2011 and 2015. During both cycles, the

¹¹⁰ United Nations Convention on the Elimination of All Forms of Discrimination against Women, *Consideration of reports submitted by States parties under article 18 of the Convention: Nauru*, CEDAW/C/NRU/1-2, 1 June 2016 (available at: <https://undocs.org/en/CEDAW/C/NRU/1-2>).

¹¹¹ United Nations Human Rights Council, para 55, *Ibid.*, n.2.

¹¹² United Nations Human Rights Council, *Universal Periodic Review*, undated (available at: <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>).

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inadequacy of the existing Criminal Code was raised, particularly the deficiencies in the existing sexual offences provisions, and a number of recommendations were made (these are outlined below). Nauru responded positively to those recommendations and most importantly considered the recommendations and the input from the UPR process when drafting the Crimes Act 2016.¹¹³ Accordingly, the UPR process was a contributory driver and factor in the reform of Nauru's criminal law.

During the first cycle, Nauru received the following recommendations from the Working Group: to "address domestic violence;" "draft a new criminal code that would, inter alia, decriminalise sexual activity between consenting adults of the same-sex;" "criminalise violence against women and provide significant penalties under the law;" and to "establish stronger laws against perpetrators of child abuse."¹¹⁴ Nauru accepted all relevant recommendations.¹¹⁵

During the second cycle, Nauru received the following recommendations from the Working Group: to "develop specific legislation on the elimination of discrimination against women;" "establish an effective protection system for children;" "include in the Criminal Code provisions that refer to the express protection against sexual and gender violence"; "implement effective measures against domestic violence, including spousal rape;" "amend the Criminal Code to lift restrictions on the freedom of movement, freedom of assembly, and freedom of expression;" and to "decriminalise sexual behaviour between consenting adults of the same-sex."¹¹⁶

Nauru committed to "ensuring that the treaties ratified particularly CRC, CEDAW [sic], and CRPD are incorporated in national laws,"¹¹⁷ supported the recommendations regarding protection of children's rights,¹¹⁸ and confirmed that the new Criminal Code would include provisions aimed at reducing gender based violence.¹¹⁹ However, Nauru only noted the recommendation made regarding decriminalising sexual behaviour between consenting adults of the same-sex and claimed that the Criminal Code did not criminalise such behaviours "in private."¹²⁰

¹¹³ HDT Interview, *Ibid.*, n.56.

¹¹⁴ United Nations Human Rights Council, *Ibid.*, n.65.

¹¹⁵ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Addendum Views Nauru*, A/HRC/17/3/Add.1, 30 May 2011 (available at: https://lib.ohchr.org/HRBodies/UPR/Documents/Session10/NR/A_HRC_17_3_Add.1_Nauru_E.pdf).

¹¹⁶ United Nations Human Rights Council, *Ibid.*, n.23.

¹¹⁷ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Addendum*, A/HRC/31/7/Add.1, 14 March 2016, para 3 (available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/050/88/PDF/G1605088.pdf?OpenElement>).

¹¹⁸ Report of the Working Group on the Universal Periodic Review: Addendum, para 11, *Ibid.*, n.117.

¹¹⁹ Report of the Working Group on the Universal Periodic Review: Addendum, para 9, *Ibid.*, n.117.

¹²⁰ Report of the Working Group on the Universal Periodic Review: Addendum, para 17, *Ibid.*, n.117.

PROCESS AND PASSAGE OF REFORM

PROCESS AND PASSAGE OF REFORM

The review of the Criminal Code was instigated in 2009 and the Crimes Act 2016 was passed by Parliament on 12 May 2016. Throughout this seven-year period, Nauru and the AAG undertook a comprehensive review of the existing Criminal Code, undertook stakeholder consultations and drafted the Crimes Act 2016. This section explores this process and the passage of reform.

Initiation

An amenable environment for reform was created from as early as 2004 with the election of a reformist government, which supported an agenda that included comprehensive legislative reform projects. Whilst we have been unable to ascertain the exact dates upon which the reform of the Criminal Code was proposed or initiated, key stakeholders identified the offer of assistance from AAG in 2009 as the trigger for the analysis of the prior Criminal Code and subsequent policy development.¹²¹ Nauru confirmed the review of the Criminal Code in their 2011 UPR National Report, which was filed in November 2010.¹²²

Consultation

There is evidence that a larger public consultation was considered as part of the process of reform of the Criminal Code. In the government's 2015 National Report submitted as part of its 2nd cycle UPR, the Nauruan government indicated that discussions were taking place regarding a public consultation; specifically in relation those aspects seen as more controversial, such as the decriminalisation of private consensual same-sex sexual acts.¹²³ We are, however, unaware of such a process being undertaken, and if it was not, why this was the case. Resource constraints and changes in government may have been factors. The consultation process previously embarked upon in the constitutional review process demonstrates that a public engagement campaign is possible in Nauru and arguably it could have contributed positively to the development of the Crimes Act 2016 and fostered broader awareness of the legal changes. Yet the failure of the constitutional reform process as a result of the negative referenda may have dissuaded Parliament from opening up the Criminal Code reform process to wider public scrutiny as a means to avoid the process being obstructed. All of these factors are regrettably, however, mere speculation.

Whilst broader public consultation was not carried out, consultations did take place with key stakeholders such as the Cabinet, the Ministry of Justice, the police, the judiciary, legal professionals, social workers and others within the criminal justice system. The OPC led the consultations with support from the AAG. The engagement

¹²¹ HDT Interview, *Ibid.*, n.74.; HDT Interview with former member of the Australian Attorney General Office, *Ibid.*, n.90.; HDT Interview, *Ibid.*, n.56.

¹²² National report – Nauru, 5 November 2010, *Ibid.*, n.22.

¹²³ United Nations Human Rights Council, Nauru, *Ibid.*, n.2.

with stakeholders principally involved policy proposal workshops and presentations,¹²⁴ and various meetings to review drafts of policy papers and the draft legislation took place as part of the reform process.¹²⁵

Drafting



Pacific Islands Forum Secretariat,
Shaping laws in the Pacific – The role of legislative drafters, 2013

High quality, effective legislation is an essential cornerstone of a free and well-functioning democracy. Having ready access to high quality legislative drafting services is fundamental to Member governments of the Pacific Islands Forum, and in turn, the communities they govern.

Throughout the Pacific Island region, countries face considerable resource constraints in terms of human capital and the requisite financial resources to satisfactorily undertake largescale legislative reform projects.¹²⁶ Equally, those same limitations hinder their ability to adequately recruit and train domestic technical experts such as skilled legislative drafters,¹²⁷ which is crucial for the successful implementation of policy changes.



Pacific Islands Forum Secretariat,
Shaping laws in the Pacific – The role of legislative drafters, 2013

The majority of [Pacific Island] countries surveyed for this report indicated that they did not have sufficient numbers of qualified national legislative drafters to meet the demand for legislative drafting from their governments.

Due to the limitations on domestic legislative drafters, governments in the Pacific have been drawing on a number of different mechanisms to supplement their national legislative drafting capabilities.¹²⁸ For instance:

- bilateral support to national legislative drafting services through donor-funded provision of external legislative drafters;

¹²⁴ HDT Interview with former member of the Australian Attorney General Office, *Ibid.*, n.90

¹²⁵ HDT Interview, *Ibid.*, n.90

¹²⁶ Pacific Islands Forum Secretariat, *Shaping laws in the Pacific*, part 4, *Ibid.*, n.94.

¹²⁷ Pacific Islands Forum Secretariat, *Shaping laws in the Pacific*, para 4.1-4.2, *Ibid.*, n.94.

¹²⁸ Pacific Islands Forum Secretariat, *Shaping laws in the Pacific*, para 3.8, *Ibid.*, n.94.

PROCESS AND PASSAGE OF REFORM

- the provision of legislative drafting services by regional and international sources; and
- the sourcing of legislative drafting services from consultants.¹²⁹

With respect to drafting the Crimes Act 2016, Nauru received bilateral support from the AAG to supplement and complement domestic legislative drafting capabilities at the OPC and the DJBC.¹³⁰

In terms of process, the AAG divided the criminal code into three main parts: offences against the person; offences against property; and offences against public order.¹³¹ The AAG and OPC subsequently developed detailed policy papers that identified the provisions for reform.¹³² The AAG and OPC engaged in extensive research and collaboration with local stakeholders to prepare the policy papers. The research involved considering existing criminal provisions across the Pacific and best practices from around the world.¹³³

In order to determine the direction of the reform, the AAG provided the Cabinet with a questionnaire regarding the policy details for approximately 20 key issues. In the policy proposals to the Cabinet, the AAG presented; (1) what the Nauruan law currently stated; (2) what the practice was in other parts of the world; (3) how other jurisdictions changed policy; and (4) arguments in favour of the proposed changes.¹³⁴ The Minister of Justice would have needed to ultimately sign off on the policy decisions.¹³⁵ The methodology of the AAG in consulting the Cabinet reflected the importance of ensuring Nauru contributed to the policy development and maintained ownership of the legislation.

The policy papers created by OPC and the AAG and the results of the questionnaire were used to provide drafting instructions to the AAG team in Canberra. The AAG continued to work closely with the OPC to prepare the draft legislation.¹³⁶ In addition to the policy papers, the OPC and the AAG team explored best practices in the Pacific and legislation in Australia, the United Kingdom and Europe to ascertain the emerging best practices in criminal law development.¹³⁷ Key stakeholders in Nauru such as legal professionals, members of the judiciary, police officers and social workers reviewed the draft code and provided feedback regarding which provisions were appropriate in the Nauru context.¹³⁸

¹²⁹ Pacific Islands Forum Secretariat, *Shaping laws in the Pacific*, para 3.8, *ibid.*, n.94.

¹³⁰ Pacific Islands Forum Secretariat, *Shaping laws in the Pacific*, *ibid.*, n.94.

¹³¹ HDT Interview, *ibid.*, n.74.

¹³² Technical Legal Assistance: *Country Specific Projects*, *ibid.*, n.99.

¹³³ HDT Interview with former member of the Australian Attorney General Office, *ibid.*, n.90.

¹³⁴ HDT Interview, *ibid.*, n.74.

¹³⁵ HDT Interview, *ibid.*, n.74.

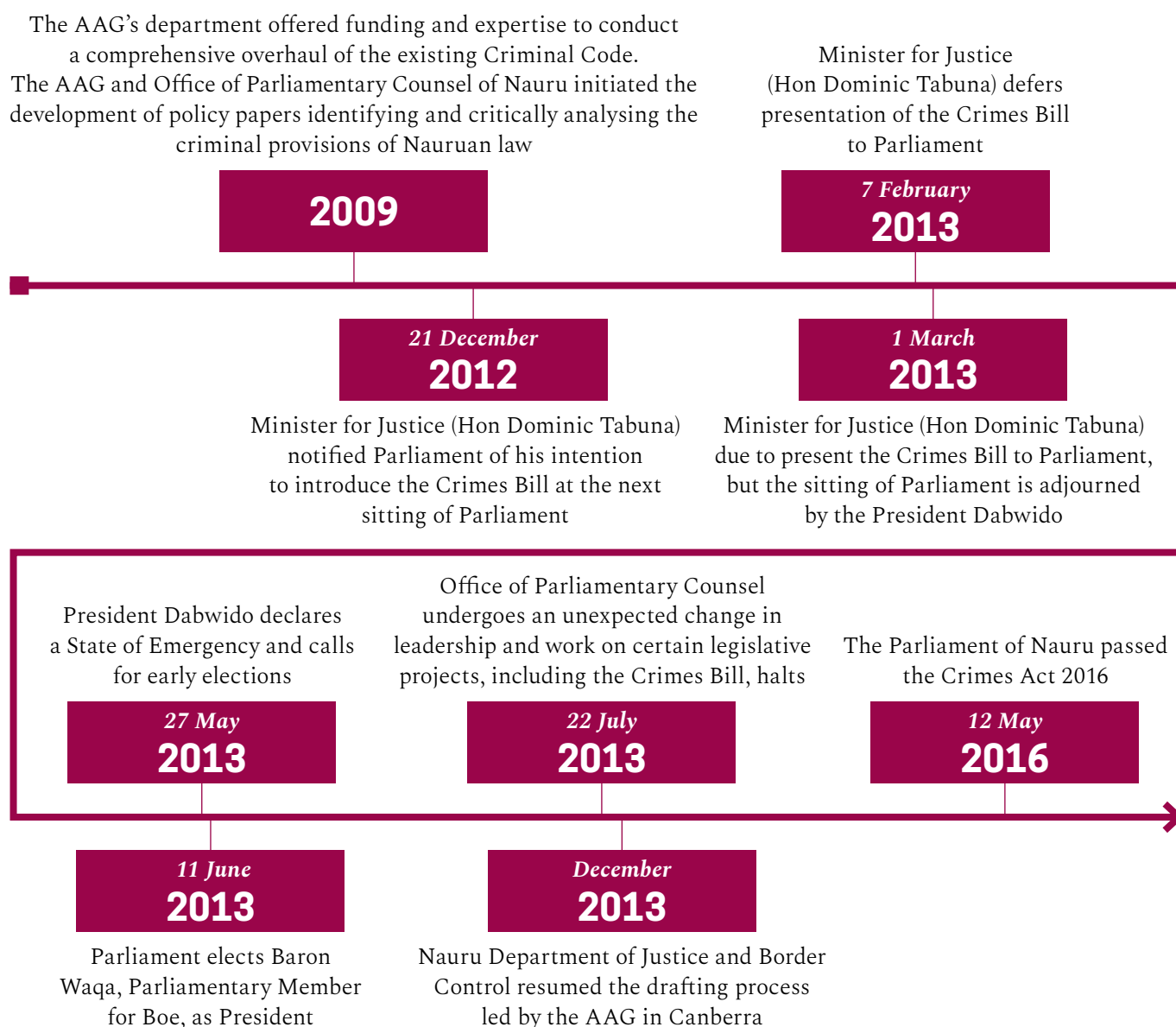
¹³⁶ Technical Legal Assistance: *Country Specific Projects*, *ibid.*, n.99.

¹³⁷ HDT Interview, *ibid.*, n.90.

¹³⁸ HDT Interview, *ibid.*, n.56.

Passage of Reform

Timeline from proposal to enactment



PROCESS AND PASSAGE OF REFORM

The Crimes Bill was due to be introduced to Parliament on 7 February 2013¹³⁹ but this was postponed due to political instability, which impacted the country and the reform process throughout 2013.¹⁴⁰

In February 2013, two Cabinet ministers resigned in opposition to President Dabwido and an additional minister was removed by the President. The exact reason for the resignations and removal is unclear, but the overarching concern appears to be an abuse of Presidential power.¹⁴¹ As a result of the uncertainty, on 1 March 2013, the Crimes Bill was deferred for presentment and Parliament was dissolved.¹⁴² Due to the lack of formal political parties in Nauru, frequent changes in coalitions can prompt this kind of instability laden with no-confidence challenges and stalemates.¹⁴³

A general election was held in June 2013 and President Baron Waqa was elected on 11 June 2013, as was a new Parliament.¹⁴⁴ As a result of a change in government, certain governmental positions and departments were abruptly reorganised, which led to a change in personnel. Importantly, the OPC was subsumed within the DJBC and some key individuals, such as the parliamentary counsel (who was removed from her position) and two deputy parliamentary counsels (who subsequently resigned), were no longer at the helm of the Criminal Code reform process.¹⁴⁵ This appears to have created a vacuum on the ground, since the OPC was leading the liaison with the AAG on reforming the Criminal Code. As a result, the process experienced a significant delay. The instability and personnel changes likely impacted legislative procedures throughout all departments as Parliament failed to pass any legislation outside of necessary appropriation and supply bills from March to November 2013.¹⁴⁶ It was not until December 2013 that the process appears to have resumed under the auspices of the DJBC when a meeting took place in Canberra.¹⁴⁷

¹³⁹ Parliament of Nauru, *Votes and Proceedings 20th Parliament*, 21 December 2012 (available at: http://www.naurugov.nr/media/22956/v_p20thparl-27-07.02.2013.pdf).

¹⁴⁰ Parliament of Nauru, *Votes and Proceedings 20th Parliament*, 7 February 2013 (available at: http://www.naurugov.nr/media/30559/no_26_v_first-seventeenth-twentieth.pdf).

¹⁴¹ The Lowy Institute, *Nauruan democracy works in a Nauruan way*, 12 June, 2013 (available at: <https://www.loyyinstitute.org/the-interpretor/nauruan-democracy-works-nauruan-way>).

¹⁴² Parliament of Nauru, *Notice Paper No. 28*, 1 March 2013 (available at: <http://www.naurugov.nr/media/22734/20thparlnoticepaper28.pdf>).

¹⁴³ Liseapa Paeniu, *How can Parliamentary Democracy Function More Effectively in Small Pacific Island Countries such as Tuvalu and Nauru?*, undated (available at: <http://www.pacii.org/journals/JSPL/2012/8.pdf>).

¹⁴⁴ Republic of Nauru, *Baron Waqa*, *Ibid.*, n.84.

¹⁴⁵ Office of Parliamentary Counsel, *Annual Report 2012 – 2013*, *Ibid.*, n.91.

¹⁴⁶ Pacific Islands Law Officers Network, *Nauru Country Report*, 6 November 2013 (available at: <http://www.pilonsec.org/images/stories/32nd/Nauru.pdf>).

¹⁴⁷ Nauru Country Report, *Ibid.*, n.146.

Passage of the Crimes Bill

In May 2016, the Minister of Justice, David Adeang, introduced the Crimes Bill¹⁴⁸ to Cabinet for approval. Cabinet authorised the Crimes Bill's introduction to Parliament for consideration and passage.¹⁴⁹ The Crimes Bill was introduced to Parliament by the Minister of Justice Adeang on 12 May 2016.¹⁵⁰ As far as we could ascertain, there was no extensive debate in Parliament. However, Minister of Justice Adeang's speech introducing the Crimes Bill highlighted the legislation's focus on protecting the human rights of victims and defendants, equal application based on gender, and increased penalties for sexual offences, particularly relating to children.¹⁵¹



Hon. David Adeang, Minister of Justice, Second Speech Reading – Crimes Bill 2016, 12 May 2016.

It is important that Nauru's criminal law reflects the standards of conduct and morality that are not only appropriate for today's society, but reflective of the society we want to have. The current Criminal Code 1899 was

written in Queensland to reflect both a different time and context. The time has come for Nauru to replace this Code with a law that is adapted to our time and our culture.

The Crimes Bill was reviewed and passed by Parliament the same day it was introduced.¹⁵² Based on the procedures for passing legislation, the Crimes Bill became law upon the certification of Hon. Ludwig Scotty as the Speaker of Parliament. Legislation does not require Presidential assent in Nauru.¹⁵³



Hon. David Adeang, Minister of Justice, Second Speech Reading – Crimes Bill 2016, 12 May 2016.

The Crimes Bill simplifies, modernises and strengthens the criminal offences in Nauru. A major inclusion in this legislation is greater protections in relation to sexual offences, particularly where children are victims. New

offences have also been included in address the criminal misuse of modern technologies and emerging trends of criminal behaviour.

¹⁴⁸ Nauru Crimes Bill 2016, 12 May 2016 (available at: <http://ronlaw.gov.nr/nauru/lpms/files/bills/0300f18dcfdbfbdce963e1f6469a78e2.pdf>). An extract can be found at section 1c of the Annex.

¹⁴⁹ HDT Interview, *ibid.*, n.56.

¹⁵⁰ Nauru Crimes Bill 2016, *ibid.*, n.94.

¹⁵¹ Hon. David Adeang, Minister of Justice, Second Speech Reading – Crimes Bill 2016, 12 May 2016 (available at: <http://ronlaw.gov.nr/nauru/lpms/files/srs/f9433bc99ae92dee7f95b65a155f7f1c.pdf>).

¹⁵² HDT Interview, *ibid.*, n.56.; Nauru Crimes Bill 2016, *ibid.*, n.106.

¹⁵³ Government of Nauru, How does a Bill get enacted by Parliament, undated (available at: <http://www.naurugov.nr/parliament-of-nauru/about-bills-and-acts/how-does-a-bill-get-enacted-by-parliament.aspx>).

PROCESS AND PASSAGE OF REFORM

Passage of Relevant Progressive Legislation

The Crimes Act 2016 was one of a number of new laws passed on 12 May 2016. Parliament passed the Criminal Procedure (Amendment) Act 2016; Corporations (Amendment) Act 2016; Partnership (Amendment) Act 2016; Electoral (Amendment) Act 2016; Nauru Education Assistance Trust Act 2016; and Mentally Disordered Persons (Amendment) Act 2016 in the same sitting.¹⁵⁴

With regard to the Mentally Disordered Persons (Amendment) Act 2016, this legislation was intended to prioritise aligning Nauruan standards of healthcare with modern understandings of mental health issues. The legislation specifically prevents a person from being regarded as mentally disordered for expressing, exhibiting, refusing or failing to express political beliefs, religious beliefs, philosophical beliefs, sexual orientation, political actions, or substance consumptions.¹⁵⁵

¹⁵⁴ Nauru Bulletin: Parliament passes laws including new Act, *Ibid.*, n.70.

¹⁵⁵ Nauru Mentally – Disordered Persons (Amendment) Act 2016, 12 May 2016, section 4A (available at: http://ronlaw.gov.nr/nauru_lpms/files/acts/b937d6a5d8df0b4cc4058c0cde96e446.pdf).

**KEY CHANGES TO
SEXUAL OFFENCES LAWS
UNDER THE CRIMES ACT
2016**

KEY CHANGES TO SEXUAL OFFENCES LAWS UNDER THE CRIMES ACT 2016



Nauru Bulletin, Parliament passes laws including new Act, 27 May 2016

The [Crimes] Act removes punishments inconsistent with international human rights standards and 'out of touch with our sense of justice'.

The Crimes Act 2016 comprehensively reformed Nauru's entire Criminal Code with particular emphasis on provisions criminalising sexual offences.¹⁵⁶ The reform was a positive step which was well-regarded by the international community. The UN Committee on CEDAW in particular welcomed the Crimes Act 2016 and consequently the changes that had been made to a number of sexual offences.¹⁵⁷



Amnesty International, Nauru: New Criminal Law is Welcome Improvement on Human Rights, 16 June 2016

The new Criminal Act will undoubtedly have a positive impact on all those in Nauru.

Overall, the modernisation of the Crimes Act 2016 largely abides by accepted good practices and legal frameworks for sexual offences, although there remain a few exceptions and shortcomings.¹⁵⁸ Importantly, the Crimes Act 2016 sought to encompass all forms of sexual violations with appropriate penalties, which are properly graded in terms of their criminal seriousness and determined on the basis of the severity of the impact on the victim, as opposed to conceptions of morality and decency.¹⁵⁹ The Crimes Act 2016 sought to reflect this legal framework by incorporating gender neutral language, widening the definitions of sexual assault to include non-penile penetrative violations, incorporating aggravating circumstances and contextual factors, and removing the archaic language entrenched in morality. The Crimes Act 2016 also incorporated a statutory definition of consent by requiring "free and voluntary agreement" and providing for a list of circumstances in which consent does not exist.¹⁶⁰

¹⁵⁶ United Nations Human Rights Council, Nauru, *Ibid.*, n.2.

¹⁵⁷ United Nations Convention of the Elimination of All Forms of Discrimination against Women, *Concluding observations on the combined initial and second periodic reports of Nauru*, CEDAW/C/NRU/CO/1-2, 22 November 2017 (available at: <https://undocs.org/en/CEDAW/C/NRU/CO/1-2>).

¹⁵⁸ Council of Europe Convention on preventing and combating violence against women and domestic violence, Treaty No. 210 (Istanbul Convention), 2011 (available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>); United Nations, Handbook for Legislation on Violence against Women, 2010 (available at: <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>).

¹⁵⁹ Handbook for Legislation on Violence against Women, pg. 26, *Ibid.*, n.158.

¹⁶⁰ Nauru Crimes Act of 2016, section 9, *Ibid.*, n.3.

Sexual Offences under the Crimes Act 2016

Part 7 of the Crimes Act 2016 contains the new sexual offences provisions. The Crimes Act 2016 includes provisions detailing the offences and the judicial processes pertinent to prosecution. It is divided into four sections: general matters, unlawful sexual acts, sexual acts with children and evidence about a complainant.

An overview is provided below of the key changes to Nauru's sexual offences laws, reflecting on the creation of greater equality and gender neutrality in application and language, the criminalisation of sexual assaults including marital rape, the standardisation of child sexual offences, the decriminalisation of consensual same-sex sexual intimacy and the modernisation of criminal procedures.

Rape

Section 105 of the Crimes Act 2016 particularises the offence of rape. The provision states that rape occurs if the perpetrator “engages in sexual intercourse with another person” and “the other person does not consent to the sexual intercourse.”¹⁶¹ The language is gender neutral, does not exclusively apply to penile penetration and requires a lack of consent or reckless disregard for consent. The penalty for rape is 20 to 25 years imprisonment depending on certain aggravating circumstances.¹⁶²

In contrast to the Criminal Code, the Crimes Act 2016 includes comprehensive definitions. For example, section 8 defines sexual intercourse and section 102 defines aggravating circumstances with respect to sexual offences.¹⁶³

The definition of sexual intercourse demonstrates a modern departure from the concept of “carnal knowledge” previously criminalised under the Criminal Code. Sexual intercourse under the Crimes Act 2016 includes genital penetration, penetration by a third object and oral sex. The expansion of penetrative offences encompassed in the rape provision to include non-penile penetration reflects good practices by eliminating the focus on “proof of penetration”, which previously failed to adequately address the harm to, and violation of, the victim.¹⁶⁴

Section 102 defines aggravating circumstances in sexual offences, and thereby recognises the complex factors involved in sexual offences. The aggravating circumstances as defined in the Crimes Act 2016 include physical harm, breaking and entering in order to commit the offence, deprivation of liberty, use of intoxicating substances, presence of

¹⁶¹ Nauru Crimes Act of 2016, section 102, *Ibid.*, n.3.

¹⁶² Nauru Crimes Act of 2016, section 102, *Ibid.*, n.3.

¹⁶³ Nauru Crimes Act of 2016, section 8 & 102, *Ibid.*, n.3.

¹⁶⁴ Handbook for Legislation on Violence against Women, pg. 26, *Ibid.*, n.158.

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a third person, and physical disability or mental impairment of the victim.¹⁶⁵

In particular, the language used to consider physical and mental disabilities in conjunction with sexual offences reflects an appropriate tone and consideration of power imbalances in sexual offences. While the Crimes Act 2016 includes many significant aggravating circumstances, it fails to adequately incorporate a breach of trust standard in accordance with good practices. The aggravating circumstances fail to address the greater impact upon the victim when assaults are perpetrated by a person “having abused her or his authority” in a position of trust and authority.¹⁶⁶

In contrast to the Criminal Code, section 104 of the Crimes Act 2016 (Application to marriage and de facto partners) explicitly states marriage or a de facto partnership is not a defence against unlawful sexual acts. Regardless of the relationship between the defendant and person against whom the Crimes Act 2016 is committed, criminality applies.¹⁶⁷

Indecent Acts

Whilst the Crimes Act 2016 does not include a provision specifically criminalising sexual assault, section 106 effectively criminalises conduct equivalent to sexual assault as an indecent act.

Section 106, Indecent acts

(1. A person (the ‘defendant’) commits an offence if:

- (a) the defendant intentionally touches another person; and*
- (b) the touching is indecent and the defendant is reckless about that fact; and*
- (c) the other person does not consent to the touching and the defendant:*
 - (i) knows that fact; or*
 - (ii) is recklessly indifferent to consent of the other person.*

Section 106(2) creates an incitement offence of intentionally causing another person to touch (i) the defendant; or (ii) a third person; or (iii) themselves; or (iv) an animal as an indecent act.

Notably, section 106 does not discriminate on the basis of gender or sexual orientation in criminalising an indecent act. The punishment for committing an indecent act is 5 years imprisonment or 8 years imprisonment if aggravating circumstances apply. What constitutes an “indecent act” is not defined in the Crimes Act 2016, but section 106 states that the standards of an ordinary person should be applied to determine if an act is indecent.¹⁶⁸ Whilst this potentially allows for a broad interpretation of actions, the classification does not sufficiently comply with good practices. Good practices dictate

¹⁶⁵ Nauru Crimes Act of 2016, section 102, *ibid.*, n.3.

¹⁶⁶ Council of Europe Convention on preventing and combating violence against women and domestic violence, Treaty No. 210 (Istanbul Convention), Art 46; *Handbook for Legislation on Violence against Women*, Pg. 26, *ibid.*, n.161.

¹⁶⁷ Nauru Crimes Act of 2016, section 104, *ibid.*, n.3.

¹⁶⁸ Nauru Crimes Act of 2016, section 106, *ibid.*, n.3.

offences of indecent assault should be replaced “with a broad offence of sexual assault graded based on harm.”¹⁶⁹ For example, the United Nations Handbook for Legislation on Violence against Women elevates a definition in the Turkish Penal Code of sexual assault “as an offence of violating the bodily integrity of another person by means of sexual conduct.”¹⁷⁰

The Crimes Act 2016 separates penetrative offences, under the offence of rape in section 105, and non-penetrative offences, under section 106, with a higher seriousness afforded to the penetrative offences.

Child Sexual Offences

Sections 116 to 125 create offences in relation to sexual acts against children. In contrast to the prior law, the age which triggers the application of these provisions is standardised as under 16 and the provisions do not differentiate on the basis of gender. The CRC defines a child as “every human being below the age of eighteen years.” Therefore, the Crimes Act 2016 child sexual offences provisions fail to adequately protect children between the ages of 16-18 in accordance with international treaty standards.¹⁷¹ The penalty under each provision increases if the child is under 13 years old. Consent is not a defence to any sexual acts with children,¹⁷² but other defences are possible against a charge of sexual acts with children.¹⁷³ An adequate defence exists if the person took reasonable steps to determine the age of the other person, honestly believed on reasonable grounds the other person was 16 years old or older, and the other person wished to consent to the relevant conduct.¹⁷⁴ Furthermore, the Crimes Act 2016 includes a ‘Romeo and Juliet’ provision in circumstances whereby the defendant was within two years of age of the other person and the other person wished to consent.¹⁷⁵

The offences covered by sections 116 to 125 are rape of a child; indecent acts in relation to children under 16 years old; causing a child to engage in sexual activity; engaging a child to provide commercial sexual services; obtaining benefits from commercial sexual services; observing private acts of child; taking images of private acts of child; taking images of private parts of child; installing device to facilitate observation or image-taking of child; and promoting or organising travel for unlawful sexual activity with a child.¹⁷⁶

169 Handbook for Legislation on Violence against Women, pg. 26, *Ibid.*, n.158.

170 Handbook for Legislation on Violence against Women, pg. 26, *Ibid.*, n.158.

171 United Nations Human Rights Office of the High Commissioner, Art 1, *Ibid.*, n.44.

172 Nauru Crimes Act of 2016, section 126, *Ibid.*, n.3.

173 Nauru Crimes Act of 2016, section 127, *Ibid.*, n.3.

174 Nauru Crimes Act of 2016, section 127, *Ibid.*, n.3.

175 Nauru Crimes Act of 2016, section 127, *Ibid.*, n.3.

176 Nauru Crimes Act of 2016, section 116-125, *Ibid.*, n.3.

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The child sexual offences provisions under the Crimes Act 2016 therefore incorporate a range of penetrative and non-penetrative sexual violations that may be experienced by children and as such they accord with international best practices; however they fail to adequately incorporate situational or aggravating factors.¹⁷⁷ The aggravating factors defined in section 102 apply to all sexual offences, including offences against children. As the aggravating circumstances for general sexual offences do not include a breach of trust element, the child sexual assault provisions fail to address “the devastating impact of the breach of trust” in the vast majority of circumstances where the abuser is a person known and trusted by the child.¹⁷⁸

Incest

Section 114 creates an offence of incest, committed if “the defendant intentionally has sexual intercourse with another person” and the defendant knows that the other person has a familial relationship with him or her. The Crimes Act 2016 lists the specific relationships that qualify: great grandparents, grandparents, parents, siblings, aunts or uncles, and nieces or nephews.¹⁷⁹ Whilst the incest provision is now markedly improved in terms of gender neutrality and clarity over how the crime is being defined, unfortunately, like its predecessor, the incest provision in the reformed Crimes Act 2016 fails to comprehensively account for modern family dynamics such as adoptive family members or re-marriages.

The punishment for incest is ten years imprisonment and consent is not a defence to the offence. If either the defendant or the other person are under the age of 16, the incest provision does not apply. Instead, the appropriate provision from sections 116 to 125 (sexual acts with children) would apply.

Unnatural Offences

The Crimes Act 2016 repealed and effectively decriminalised private consensual same-sex sexual acts between adults by excluding it from the reformed legislation.

Language and Treatment of People Living with Disabilities

The Crimes Act 2016 comprehensively modernises the language used in sexual offences provisions relating to victims with disabilities and addresses aggravating circumstances in this regard. The language distinguishes factual circumstances in assessing criminal actions and disregards the formerly archaic notions of morality that governed the language. The outdated terminology, such as the use of terms like “carnal knowledge” and discriminatory treatment of persons with disabilities, identifying them as “imbeciles” and “idiots” which existed in the Criminal Code, do not feature in the new Crimes Act 2016.

¹⁷⁷ *Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards*, *Ibid.*, n.60.

¹⁷⁸ *Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards*, *Ibid.*, n.60.

¹⁷⁹ Nauru Crimes Act of 2016, section 114, *Ibid.*, n.3.

The Crimes Act 2016 takes a step towards using appropriate language to address impairment or disability. For instance, it is an aggravating factor where a defendant is reckless to the fact that a person against whom a sexual crime has been committed has “a serious physical disability” or “mental impairment”.¹⁸⁰ The Crimes Act 2016 defines “mental impairment” as including senility, intellectual disability, mental illness, brain damage, severe personality disorder, or a psychological condition that involves abnormality.¹⁸¹ It further specifies “mental illness” as an “underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary.”¹⁸² While the terms “mental impairment” and “mental illness” reflect an improvement from the archaic language in the Criminal Code, the language does not wholly abide by international best practice. The Convention on the Rights of Disabled Persons defines persons with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”¹⁸³ The Mentally Disordered Persons (Amendment) Act 2016, which passed on the same day as the Crimes Act 2016, relies on the term “mental disorder” with a different definition that likewise falls short of international best practices.¹⁸⁴

Separately, the Crimes Act 2016 uses appropriate terminology to define sexual intercourse with respect to sexual offences and institutes gender neutral language throughout the sexual offences provisions in accordance with Nauru’s newly adopted Legislative Drafting Manual.¹⁸⁵

Evidence and Procedure

The Crimes Act 2016 removed procedural impediments to justice for victims of sexual offences. Following the common law revocation of the corroboration rule in *The Republic v Saaed Mayahi*, the Crimes Act 2016 codified the removal of that rule in section 101. Section 101 abolished any rule that required corroboration of evidence from a witness in order to convict a defendant for a sexual offence.¹⁸⁶

The Crimes Act 2016 also provides for evidentiary procedures in relation to complainants aimed at maintaining the dignity and respect of the victim. Sections 128 to 138 outline which evidence about a complainant is, or is not, admissible and

¹⁸⁰ Nauru Crimes Act of 2016, section 102, *ibid.*, n.3.

¹⁸¹ Nauru Crimes Act of 2016, section 8, *ibid.*, n.3.

¹⁸² Nauru Crimes Act of 2016, section 8, *ibid.*, n.3.

¹⁸³ United Nations Disability, Convention on the Rights of Persons with Disabilities, art 1 (available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html>).

¹⁸⁴ Mentally Disordered Persons (Amendment) Act 2016, *ibid.*, n.155.

¹⁸⁵ United Nations Human Rights Office of the High Commissioner, *Committee on the Elimination of Discrimination against Women reviews the report of Nauru*, 27 October 2017 (available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22334&LangID=E>).

¹⁸⁶ Nauru Crimes Act of 2016, *ibid.*, n.3.

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permissible in any criminal proceeding. Specifically, section 130 prohibits “any questions about, or [admission] of any evidence of, the sexual reputation of the complainant.”¹⁸⁷ A procedural exception to this exists but under the strict management of the court.¹⁸⁸ In any event, section 137 prevents the defendant from using sexual history as a means to create a defence of consent.

Section 137, Admissibility of sexual history evidence

Sexual history evidence is not admissible to support an inference that the complainant is the kind of person who is more likely to have consented to the sexual activity to which the charge relates.

Although there remain some shortcomings in the sexual offences provisions of the new Crimes Act 2016, overall it has been a major step forward in terms of legal reform. The incorporation of international good practices was not universally achieved, but there was certainly a good faith effort to conform the new criminal law to international standards.¹⁸⁹

United Nations treaty bodies have recognised the comprehensive changes. The CEDAW Committee, in particular, concluded that Nauru’s repeal of the Criminal Code and passage of the Crimes Act 2016 demonstrated a positive step in addressing gender based violence by “broadening the definition of rape, criminalising marital rape and removing the corroboration requirement in sexual offences and the admissibility of a complainant’s sexual history.”¹⁹⁰



The Committee welcomes the efforts towards the comprehensive review of existing laws to ensure compliance and harmonization with the provisions of the Convention...

United Nations Committee on the Rights of the Child,
concluding observations on the initial report of Nauru,
28 October 2016⁷

¹⁸⁷ Nauru Crimes Act of 2016, *Ibid.*, n.3.

¹⁸⁸ The defendant may make an application to the court to question the claimant on sexual activities, but the evidence sought must be substantially relevant to the facts at issue, section 132-136, *Ibid.*, n.3.

¹⁸⁹ HDT Interview, *Ibid.*, n.90.

¹⁹⁰ Concluding observations on the combined initial and second periodic reports of Nauru, section 4(c), *Ibid.*, n.157.

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Implementation

The Crimes Act 2016 was in many respects a landmark piece of legislation and an extensive statute. We have not, however, found any evidence of a comprehensive programme of implementation being undertaken and there appears to have been only limited awareness-raising and training conducted. For example, a government bulletin was issued on 27 May 2016 explaining that the new Crimes Act 2016 had been passed by Parliament along with a number of other laws. The bulletin noted that the Crimes Act 2016 replaced the colonial-era Criminal Code and addressed “emerging trends of criminal behaviour as well as [protecting] the more vulnerable groups – women and children,” aligning the criminal law with international human rights standards.¹⁹¹ The Minister of Home Affairs, Education, Land Management and Health, Hon. Charmaine Scotty, confirmed in a statement to the United Nations in 2018 that Nauru had conducted public education and provided training to the Domestic Violence Police Unit regarding the Crimes Act 2016.¹⁹² However, we haven’t been able to gather any additional information about the extent of that public education and stakeholder training.

We also understand that Australia continued their assistance and provided training to the Nauru police force. Pursuant to Australia’s aid program in Nauru and the Pacific Police Development Program, the AAG assisted the DJBC with the preparation of police training.¹⁹³ It is not clear whether this training covered the prosecution of sexual offences under the new Crimes Act 2016. To our knowledge, this is the extent of public communication and training with respect to the new criminal law framework.

We have been unable to ascertain why a comprehensive implementation programme was not rolled out (or to the extent it was, why this is not public information), nor why more was not done to raise awareness amongst the public, particularly given that there appears to have been no public consultation undertaken as part of the review and reform of the Criminal Code. Resources may have been a significant factor in this regard. However, as publicly acknowledged by the government as early as 2011, laws do not, in and of themselves, resolve human rights issues. Legal reform is only one aspect of a broader reform package that is necessary to effectively respond to sexual assaults and violations.¹⁹⁴ Preventative measures, such as education initiatives and protective measures (such as putting in place counselling and crisis services) are of equal importance.¹⁹⁵ The



A greater understanding of the Crimes Act within the community has led to the rise in criminal reporting. At the same time, we have improved training and increased resources to the Domestic Violence Unit to effectively carry out their investigations.

Charmaine Scotty,
Statement to
United Nations,
12-16 March 2018

The Government of Nauru remains conscious of the fact that laws alone do not resolve human rights concerns.

Hon. Ms. Marlene Moses,
Permanent
Representative
of Nauru to the UN,
7 June 2011

¹⁹¹ Parliament passes laws including new Act, *Ibid.*, n.70.

¹⁹² Charmaine Scotty, *Statement by the Honourable Charmaine Scotty M.P., Minister for Home Affairs, Education, Land Management and Health at the sixty second session of the Commission on the Status of Women (CSW)*, 12-16 March 2018 (available at: http://nauru-news.com/wp-content/uploads/2018/03/National-Statement-CSW62_Minister-Charmaine-Scotty-12-16Mar2018.pdf).

¹⁹³ Australian Government Department of Foreign Affairs and Trade, *Aid Program Performance Report 2016-2017 – Nauru*, September 2017 (available at: <https://dfat.gov.au/about-us/publications/Documents/nauru-appr-2016-17.pdf>).

¹⁹⁴ *Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards*, *Ibid.*, n.60.

¹⁹⁵ *Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards*, *Ibid.*, n.60.

absence of such measures following the enactment of the Crimes Act 2016 in far-reaching terms seems therefore to have been a real lost opportunity to realise effective change and integrate a comprehensive state response to crime, particularly sexual assaults.

Reporting and Prosecution of Sexual Offences

Generally, there is a lack of publicly available data regarding the reporting, charging and prosecution of criminal offences in Nauru. The available data is not disaggregated, which limits the strength of our conclusions and analysis.



The Committee is concerned that the lack of a systematic mechanism of data collection has resulted in a scarcity of disaggregated data on children, particularly children with disabilities, children living in marginalized situations and asylum-seeking and refugee children.

United Nations, Committee on Rights of the Child, concluding observations on the initial report of Nauru, 28 October 2016, para 14

In Nauru's initial and secondary report to CEDAW, Nauru explained that 58 criminal offences had been reported by women and children in 2014, but the report failed to specify which offences.¹⁹⁶ Whilst we are not aware of any publicly available comprehensive statistics on the reporting and prosecution of sexual offences in Nauru, in a statement to CEDAW in October 2017, the government of Nauru outlined cases reported under the Crimes Act in 2016 from January to August 2017.¹⁹⁷ Due to the lack of comprehensive historical data on sexual offences in Nauru, it is difficult to surmise the impact of the Crimes Act 2016 on improving the prosecution of sexual offences. In the entirety of 2016, 38 cases were reported to the Domestic Violence Unit. In contrast, 38 cases were reported from January to August 2017.¹⁹⁸ Without consistent methods of collecting and reporting data to compare with the recent report to CEDAW, we are unable to draw definitive conclusions. However, the same number of cases were reported in the first eight months of 2017 as in the entire year in 2016, which generally suggests an increase in reporting. Furthermore, Nauru did not specify how many of the reported cases were successfully investigated and/or prosecuted.

Nauru Statement to CEDAW, Cases Reported to Domestic Violence Unit, 27 October 2017

2016	January – August 2017
<ul style="list-style-type: none"> ▪ 38 total ▪ 10 involving children ▪ 18 involving sexual offences 	<ul style="list-style-type: none"> ▪ 38 total ▪ 23 involving sexual offences with child victims ▪ 10 involving sexual offences with adult victims

¹⁹⁶ Consideration of reports submitted by States parties under article 18 of the Convention: *Nauru*, *Ibid.*, n.110.

¹⁹⁷ Republic of Nauru, *Statement to Committee on the Elimination of Discrimination against Women*, 27 October 2017 (available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/NRU/INT_CEDAW_STA_NRU_29326_E.pdf).

¹⁹⁸ *Statement to Committee on the Elimination of Discrimination against Women*, *Ibid.*, n.197.

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Despite the lack of comprehensive reporting, the prevalence of sexual offences in Nauru is corroborated by historical surveys of violence and sexual abuse against women and children. In 2014, the Nauru Family Health and Safety Study surveyed 148 Nauruan women aged 15 to 64 on their experiences with violence.¹⁹⁹ Of the 148 respondents, 30.4 per cent reported “sexual abuse in childhood.” The study targeted questions to a sub-group of 131 women. Of these 131 respondents, 48.1 per cent reported physical and/or sexual partner violence at least once in their lifetime.²⁰⁰

In October 2016, CRC reviewed Nauru’s compliance with the Convention and provided recommendations for improvements to legislation. CRC did not specify any improvements to the Crimes Act 2016, but generally commented on issues with the prosecution of sexual offences against children. Namely, CRC expressed concern that “many cases involving child abuse and sexual assault against children that proceed to the prosecution stage are withdrawn by the victims or witnesses owing to fear of financial hardship and the risk of damaging the family’s reputation.”²⁰¹ These concerns surrounding reputational damage suggest a culture that disapproves of publicly acknowledging child abuse and sexual assault.

Whilst the lack of data and concerns raised by the CRC are valid, the increase in reporting in 2017 may be indicative of a longer trend towards increased protection against sexual violence in Nauru. The 2015 Nauru Country Report to the Pacific Islands Law Officer’s Network (‘PILON’)²⁰² indicated a shift towards successful prosecutions of sexual offences.²⁰³



Pacific Islands Law Officers Network, Nauru Country Report, December 2015, para 5

It is worth reporting that this year Nauru has successfully completed prosecutions in a number of sexual offence cases leading to imprisonment terms. In those cases, despite the historical repressive culture against victims reporting and pushing their cases to trial, victims and their supporters are beginning to come to court with the

will to give evidence and bring their perpetrators to justice. With improved public awareness programmes, improved investigative structures by the police and improved victim support systems, the culture of non-reporting or non-attendance in court will be minimized.

¹⁹⁹ Nauru Ministry of Home Affairs, *Nauru Family Health and Support Study*, October 2014 (available at: https://asiapacific.unfpa.org/sites/default/files/pub-pdf/Nauru_family_health_support_survey_report_2014.pdf).

²⁰⁰ Nauru Family Health and Support Study, *ibid.*, n.199.

²⁰¹ United Nations Convention of the Rights of the Child, *Concluding observations on the combined initial report of Nauru*, CRC/C/NRU/CO/1, 28 October 2016 (available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/NRU/CO/1&Lang=En).

²⁰² Pacific Islands Law Officers’ Network, (available at: <http://www.pilonsec.org/>). PILON enables coordination and assistance between a network of senior law officers in Pacific Island countries on issues of domestic and regional law and justice.

²⁰³ Pacific Islands Law Officers Network, *Nauru Country Report*, December 2015, para 5 (available at: http://pilonsec.org/images/34th/countryreports2016/nauru_country_report.pdf).

One key indicator of the effectiveness of the Crimes Act 2016 will be statistics demonstrating an increase in the prosecution of sexual offences that are clearly historically prevalent in Nauru. The 2017 Nauru Country Report to PILON highlighted that prosecutions of sexual offences have occurred under the Crimes Act 2016, noting that three criminal prosecutions had taken place, including one sexual offence prosecution. This demonstrates that the reformed legislation is applied by the legal system.²⁰⁴ The lack of comprehensive reporting of sexual offences prosecutions limits the conclusions we may draw, but at least prosecutions of sexual offences under the Crimes Act 2016 have occurred.²⁰⁵

Further Legislative and Policy Developments

Since 2016, Nauru has continued to seek to fulfil its international obligations and take steps to act on the recommendations it has received from the international sphere by enacting further legislation and developing policies to provide greater protection for, and promote the rights of, women and children. It is encouraging to see that further legal progress has been made and it is hoped that the proliferation of legislation is met with comprehensive implementation, monitoring and enforcement.

Child Welfare Protection Act

On 10 June 2016, shortly after the passage of the Crimes Act 2016, Nauru reinforced their commitment to child welfare and protection with the passage of the Child Welfare Protection Act 2016.²⁰⁶ The legislation was welcomed by UNICEF as “a comprehensive and forward-looking Child Protection Act” which enforced children’s rights in accordance with international treaties such as the CRC.²⁰⁷

Domestic Violence and Family Protection Act

The Domestic Violence and Family Protection Act 2017 (‘DVFP Act’) passed on 27 April 2017²⁰⁸ and came into effect in Nauru on 1 June 2017.²⁰⁹ The legislation is intended to provide for “the protection of victims of domestic violence, the rehabilitation of persons in domestic relationships against domestic violence and related matters.”²¹⁰ It was originally considered that certain gender-based violence provisions should

²⁰⁴ Pacific Islands Law Officers Network, *Nauru Country Report*, 18-20 October 2017, para 3 (available at: http://pilonsec.org/images/2017/Annual_Meeting/Country_Reports/2017-PILON-Country-Report-Nauru.pdf).

²⁰⁵ *Republic of Nauru v AB* [2016] NRSC 29; Criminal Case 47 of 2016, 14 November 2016 (available at: http://ronlaw.gov.nr/nauru_lpms/index.php/court_decision/view/108); *Republic of Nauru v AD (Juvenile)* [2019] NRSC 1, 2 February 2019 (available at: http://ronlaw.gov.nr/nauru_lpms/index.php/court_decision/view/122); *Republic of Nauru v EF* [2016] Criminal Case No. 94 of 2016 SC94 of 2016 (available at: http://ronlaw.gov.nr/nauru_lpms/index.php/court_decision/browse/0/letter/R/year/any/).

²⁰⁶ Nauru Child Protection and Welfare Act 2016, 10 June 2016, (available at: http://ronlaw.gov.nr/nauru_lpms/files/acts/66d8a517262f0adab959f3155b08b0db.pdf).

²⁰⁷ UNICEF, *UNICEF welcomes Nauru Child Protection Act*, 14 June 2016 (available at: https://www.unicef.org/pacificislands/1852_25560.html).

²⁰⁸ Pacific Community Regional Rights Resource Team, *SPC welcomes Nauru’s domestic Violence and Family Protection Bill*, 11 May 2017 (available at: <https://rrrt.spc.int/media/stories/2017/05/spc-welcomes-naurus-domestic-violence-and-family-protection-bill>).

²⁰⁹ Nauru Domestic Violence and Family Protection Act 2017, 15 May 2017 (available at: http://ronlaw.gov.nr/nauru_lpms/files/acts/3f6b883ca6cfbf1c2e83767f876266e8.pdf).

²¹⁰ Nauru Domestic Violence and Family Protection Act 2017, *ibid.*, n.208.

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be part and parcel of the reformed Criminal Code²¹¹ as the Criminal Code did not include specific provisions addressing domestic violence. However, it was later felt that stand-alone legislation would be more appropriate following strong calls for such legislation.²¹²

The DVFPA was drafted with assistance from the Pacific Community's Regional Rights Resource Team ('RRRT') and funded by the Australian Pacific Women Shaping Pacific Development aid program.²¹³ The DVFPA created a Family Protection Coordination Committee, introduced Safety and Protection Orders and mandatory counselling for victims and perpetrators.²¹⁴ Whilst sexual offences are criminalised in the Crimes Act 2016, the stand-alone legislation provides comprehensive provisions pertaining to domestic violence and complements the Crimes Act 2016.²¹⁵ It appears that Nauru has undertaken implementation efforts with respect to the DVFPA through "improved training and increased resources to the Domestic Violence Unit" and "a media campaign and community awareness campaign."²¹⁶ As the purpose of the DVFPA and Crimes Act 2016 are largely aligned, the increased implementation under the DVFPA may provide redress regarding the lack of implementation of the Crimes Act 2016 and may also increase awareness of the Crimes Act 2016; specifically the sexual offences provisions.

National Gender Policy

In 2017, Nauru confirmed the development of a national Gender Policy to CEDAW²¹⁷ to complement the existing National Women's Policy. The Gender Policy will apply across government departments and will be incorporated into policies and laws.²¹⁸ The National Women's Policy is monitored by Nauru's Women's Affairs Department and calls for a collaborative response from government, civil society, and the community on gender priorities, such as heightened women's participation in decision-making and government leadership, access to education by girls and women, improved women's health services, and improved economic status through workplace equality.²¹⁹ Nauru hopes to rapidly implement the National Gender Policy by building on the existing

²¹¹ Pacific Islands Law Officers' Network, Nauru Country Report, *Ibid.*, n.203.

²¹² United Nations Human Rights Council, para 55, *Ibid.*, n.2.

²¹³ Australian Department of Foreign Affairs and Trade, *Domestic violence and family protection laws to protect Nauruan women and children*, 6 December 2017 (available at: <https://dfat.gov.au/news/news/Pages/domestic-violence-and-family-protection-laws-to-protect-nauruan-women-and-children.aspx>).

²¹⁴ Domestic Violence and family protection laws to protect Nauruan women and children, *Ibid.*, n.192.

²¹⁵ HDT Interview, *Ibid.*, n.56.

²¹⁶ Statement to the United Nations Commission on the Status of Women (CSW), *Ibid.*, n.192.

²¹⁷ Statement to the United Nations Commission on the Status of Women (CSW), *Ibid.*, n.192.

²¹⁸ Statement to the United Nations Commission on the Status of Women (CSW), *Ibid.*, n.192.

²¹⁹ Convention on the Elimination of All Forms of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention: Nauru, para 38, *Ibid.*, n.110.

framework, the National Women's Policy and has conducted a comparative analysis of 7 Pacific island countries to develop the policy.²²⁰

Public Response and Impact

Due to the undeveloped nature of the media sector in Nauru, it has not been possible to establish to what extent there was broader promotion and publicity surrounding the passage and enactment of the Crimes Act 2016, and what the public reaction was. Some observers indicated that the public may have utilised Facebook to demonstrate their resistance to the decriminalisation of private consensual same-sex sexual intimacy.²²¹ We have been unable to gauge the level of resistance, but this may have motivated some later changes in legislation, such as the Births, Deaths and Marriages Act 2017. This Act defines marriage as a heterosexual union²²² and explicitly states that same-sex marriages entered into in a foreign country are not recognised in Nauru.²²³ Broader consultations and a process of sensitisation and education as part of implementing the Crimes Act 2016 may have forestalled such a reaction.

The impact of the reform of the Criminal Code and the enactment of the new Crimes Act 2016 on the public more generally has been very difficult to gauge given the dearth of readily available information. Certainly some cases of sexual offences are being prosecuted and therefore the Crimes Act 2016 is being enforced. Yet, given that there appears to have been very limited education, training and awareness-raising work completed, it is unlikely that the full impact of the Crimes Act 2016 along with other related legislation is being realised without the important preventative measures being put in place. Equally, we have been unable to assess whether the decriminalisation of private consensual same-sex sexual acts between adults has had any impact on the lived experience of LGBT people.

The Crimes Act 2016 was passed only 3 years ago. With the passage of time, it is hoped that the full extent of the impact of the Crimes Act 2016 will be realised and visible.

²²⁰ Statement to the Convention on the Elimination of Discrimination Against Women, *Ibid.*, n.197.

²²¹ HDT Interview, *Ibid.*, n.56.

²²² Nauru Births Deaths and Marriages Registration Act 2017, 19 December 2017, (available at: http://ronlaw.gov.nr/nauru_lpms/index.php/act/view/1252).

²²³ Nauru Births Deaths and Marriages Registration Act 2017, Section 70, *Ibid.*, n.222.



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Nauru's reform of its Criminal Code with the passage of the Crimes Act 2016 provides an example of reform where regional and international support and assistance has played a key role. Without the financial support and expertise provided by the AAG, the reform process may not have occurred.²²⁴

The assistance from the AAG was critical in reviewing the Criminal Code and drafting and finalising the Crimes Act 2016. However, the lack of long-term human capital in Nauru with expertise in policy development and legislative drafting presents an ongoing issue for longer-term and sustainable legal progress. The limitations within the DJBC are particularly telling. For example, in 2017 the DJBC did not employ any local lawyers²²⁵ and has been characterised as functioning as more or less a check and balance mechanism on technical legal assistance from external partners.²²⁶ Undoubtedly the focus needs to shift towards developing domestic legal and drafting expertise, but financial resources may continue to hamper progress in this area.

The apparent lack of comprehensive implementation with respect to the Crimes Act 2016 will likely hinder the effectiveness of the legislation, impacting upon Nauru's ability to realise the underlying aims of the legislation. In particular, since cultural norms, attitudes and traditions act as key barriers to the realisation of equality and greater protection for women, children and vulnerable groups in Nauru,²²⁷ preventative measures, such as education and awareness-raising, seem key to attaining societal change alongside legal change.

The Crimes Act 2016 was an important positive step. However, the legislation was passed in a shadow of human rights concerns regarding the treatment of refugees and asylum seekers, freedom of expression, and the rule of law vocalised by reputable international organisations.²²⁸

²²⁴ HDT Interview with former member of the Australian Attorney General Office, *Ibid.*, n.90.; HDT Interview, *Ibid.*, n.74.; HDT Interview, *Ibid.*, n.56.

²²⁵ Pacific Islands Law Officers' Network, Nauru Country Report, *Ibid.*, n.203.

²²⁶ Pacific Islands Law Officers' Network, Nauru Country Report, *Ibid.*, n.203.

²²⁷ UNICEF, *Situation Analysis of Children in Nauru*, December 2017 (available at: https://www.unicef.org/pacificislands/07_Situation_Analysis_of_Children_Nauru.pdf).

²²⁸ Human Rights Watch, Australia: Appalling Abuse, Neglect of Refugees on Nauru, *Ibid.*, n.21.; Amnesty International, *Nauru's detained children must be given true freedom*, 1 November 2018 (available at: <https://www.amnesty.org/en/latest/news/2018/11/australia-naurus-detained-children-must-be-given-true-freedom/>); United Nations Office of the High Commissioner of Human Rights, *Committee on the Rights of the Child reviews the reports of Nauru*, 14 September 2016 (available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20486&LangID=E>); United Nations High Commissioner for Refugees, *Immediate solutions needed for Nauru*, 10 August 2016 (available at: <https://www.unhcr.org/en-au/news/press/2016/8/580ee6064/unhcr-immediate-solutions-needed-for-nauru.html>); Human Rights Law Centre, *After five years of indefinite detention, children on Nauru are now suicidal*, 19 September 2018 (available at: <https://www.hrlc.org.au/news/2018/9/19/after-5-years-of-indefinite-detention-children-on-nauru-are-now-suicidal-un-hears>).



We are extremely concerned about the serious allegations of violence, sexual assault, degrading treatment and self-harm contained in more than 1,000 incident reports from offshore processing centres on Nauru, many of which reportedly involved children.

**United Nations
High Commissioner
for Human Rights
Statement,
12 August 2016**

In August 2016, the United Nations Refugee Agency and the United Nations High Commissioner for Human Rights made independent statements recognising and condemning the dismal living conditions experienced by refugee and asylum seekers in the Nauru RPC and incidents of assault and sexual assault, which in some instances involved children.²²⁹

A situational analysis undertaken by UNICEF in 2017 identified women and girls living in the Australian-run migrant detention facility as being particularly vulnerable to physical and sexual violence, with multiple reports of sexual assault or harassment, including groping, touching, explicit threats, demands for sex and attempted rape.²³⁰

In addition to the underlying situation in the RPC, Nauru's reaction to the domestic and international criticism has prompted further concern regarding freedom of the press. In Nauru's review by the CRC Committee in September 2016, the CRC Committee expressed concern that international organisations were "subject to criminalisation" and high visa fees prevented research and reporting on the treatment of children in Nauru. Amnesty International has portrayed the restriction on freedom of expression and freedom of the press as a tactic to suppress coverage of Nauru's "inhumane treatment of refugees."²³¹ Nauru has justified its actions as a means to prevent false reporting about the treatment of refugees.²³² Due to the mounting international pressure, all child refugees were removed from Nauru in February 2019.²³³

In tandem with the concerns for refugee conditions, Nauru received heightened criticism regarding a breakdown in the rule of law and constitutional violations by the ruling government, commencing in 2014. The primary concerns relate to the independence of the judiciary and the silencing of opposing political figures. In January 2014, Nauru dismissed Chief Justice Peter Law in contravention of constitutional procedures.²³⁴ Chief Justice Law alleges his removal from office was orchestrated by Minister for Justice David Adeang in violation of the principle of

²²⁹ Immediate solutions needed for Nauru, *Ibid.*, n.228.

²³⁰ Situation Analysis of Children in Nauru, *Ibid.*, n.227.

²³¹ Amnesty International, *Nauru: Government must lift press restrictions on ABC ahead of Pacific Islands summit*, 3 July 2018 (available at: <https://www.amnesty.org/en/latest/news/2018/07/nauru-government-must-lift-press-restrictions-on-abc-ahead-of-pacific-islands-summit/>).

²³² Committee on the Rights of the Child reviews the reports of Nauru, *Ibid.*, n.228.

²³³ United Nations Refugee Agency, *The Refugee Brief – 28 February 2019*, 28 February 2019 (available at: <https://www.unhcr.org/refugeebrief/the-refugee-brief-28-february-2019/>).

²³⁴ Nauru Legislation Publication Act 2011, *Ibid.*, n.83.

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separation of powers.²³⁵ In May and June 2014, five opposition Members of Parliament were suspended by the Speaker of Parliament²³⁶ for criticising the government.²³⁷ The restrictions on freedom of expression of the opposition escalated to include cancelling Member of Parliament Roland Kun's passport in July 2015.²³⁸ As a result, he was unable to leave Nauru to re-join his family for over a year.²³⁹ This disregard for constitutional procedures and the rule of law in Nauru may restrict the long-term success and impact of legislative reform.

The improvements made to Nauru's criminal law should in no way detract from the significant human rights concerns that have been evident in Nauru. It can only be hoped that the Nauruan government will heed domestic and international calls and address these concerns head on. With the advent of the Crimes Act 2016 and other related legislation, such as the Child Welfare Protection Act and the Domestic Violence and Family Protection Act, Nauru now has a relatively robust legal framework to protect women, children and other groups from sexual assault and violence. It is essential that the legislative framework is operationalised and enforced in the future.

²³⁵ Hon. Geoffrey M Eames, *Submission to Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, 27 May 2015 (available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions).

²³⁶ Republic of Nauru, *Supreme Court has deemed suspension of MPs lawful*, undated (available at: <http://www.naurugov.nr/government-information-office/media-release/supreme-court-has-deemed-suspension-of-mps-lawful.aspx>).

²³⁷ Nauru Legislation Publication Act 2011, *Ibid.*, n.83.

²³⁸ Australian National University, *Australia and New Zealand urged to take action over Nauru rights*, 29 July 2015 (available at: <https://www.anu.edu.au/news/all-news/australia-and-new-zealand-urged-to-take-action-over-nauru-rights>).

²³⁹ The Guardian, *Nauru opposition MP secretly granted NZ citizenship flees to Wellington*, 12 July 2016 (available at: <https://www.theguardian.com/world/2016/jul/12/nauru-opposition-mp-secretly-granted-nz-citizenship-flees-to-wellington>).

ANNEX

ANNEX

1. Legislation and Bills

- a. Constitution of Nauru, 29 January 1968; Amended on 17 May 1968 (extracts)
- b. Nauru Criminal Code 1899, 3 December 2011 (extracts)
- c. Nauru Crimes Act of 2016, 12 May 2016 (extracts)
- d. Nauru Crimes Bill 2016 (extracts)



